

University of Michigan Journal of Law Reform

Volume 39

2006

Not from Concentrate? Media Regulation at the Turn of the Millennium M arch 18-19, 2005

Journal of Law Reform

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Recommended Citation

Journal of Law Reform, *Not from Concentrate? Media Regulation at the Turn of the Millennium M arch 18-19, 2005*, 39 U. MICH. J. L. REFORM 229 (2006).

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TRANSCRIPT

NOT FROM CONCENTRATE? MEDIA REGULATION AT THE TURN OF THE MILLENNIUM

UNIVERSITY OF MICHIGAN LAW SCHOOL

MARCH 18–19, 2005

ROOM 250, HUTCHINS HALL

WELCOME AND INTRODUCTORY REMARKS

LIZ WEI: Hi, my name is Liz Wei and I am one of the coordinators of the event today. Ryan Calo, is the other coordinator, and on behalf of Volume 38 of the *Journal of Law Reform* we want to welcome you to our Symposium on Media Regulation, NOT FROM CONCENTRATE? MEDIA REGULATION AT THE TURN OF THE MILLENNIUM. We are happy to see such a full audience today for the opening keynote address, as we believe the issues of media ownership are vitally important, and they certainly affect every person in the room tonight.

We are lucky to have with us a truly impressive group of speakers in this field, experts in law and practice, and we thank them for making their way all the way to Michigan, where it's so cold out still, so that they could share their research and their expertise in this area and the discussions. Tomorrow they will be speaking over the course of three panels, and we hope that everyone here will join us again tomorrow. The first panel is at 10:00 in the morning, and it's here in this room. We are truly thrilled to have Eric Alterman with us tonight, and I'm sure that you're all looking forward to hearing him speak as much as I am. In bringing him here we were generously supported by the University of Michigan Law School and the Michigan Department for Communication Studies, and in particular, Professor Susan Douglas and Professor Russell Neuman lent us much support and advice. And with that I would like to introduce Professor Susan Douglas, the Chair of the Michigan Communication Studies Department, and she will introduce Eric Alterman.

SUSAN DOUGLAS: I want to thank Ryan Calo and Liz Wei for working so hard on this, and putting together what promises to be a really terrific conference. They've worked very hard. I also want to thank the Howard R. Marsh Endowment for the Study of

Journalistic Performance, which makes this lecture and some of this conference possible. When we were meeting back in the fall to talk about who would be the perfect keynote for a conference on media ownership and media concentration there was really one person we really wanted to get, and that was Eric Alterman, who many of you know as the dazzling media columnist for *The Nation*. Eric is one of the leading experts on media concentration, and particularly media bias, and on their consequences for democracy. Eric Alterman has been termed and I quote, “the most honest and incisive media critic writing today.” He is the author of the national best seller, *What Liberal Media? The Truth About Bias and the News*, which I strongly, strongly recommend. It’s a great book. He also writes the “Altercation,” his weblogger for MSNBC.com. He’s also a senior fellow at the Center for American Progress. His book, *Sound and Fury: The Making of the Punditocracy*, another terrific book, won the 1992 George Orwell Award, and his *It Ain’t No Sin to be Glad You’re Alive: The Promise of Bruce Springsteen*, won the 1999 Stephen Crane Literary Award. Eric Alterman is also the author of *The Book on Bush, How George W. (Mis)leads America*, which he did with Mark Green, and *When Presidents Lie: A History of Deception and its Consequences*. Eric Alterman has also, in addition to all of this, been a contributing editor to or columnist for *Rolling Stone*, *Elle*, *Mother Jones*, *World Policy Journal* and the *Sunday Express* in London. He is a senior fellow of the World Policy Institute at the new school and an adjunct professor of journalism at Columbia University. He has a B.A. in History and Government from Cornell, an M.A. in International Relations from Yale, and his Ph.D. in U.S. History from Stanford. Please join me in welcoming Eric Alterman.

ERIC ALTERMAN: Thank you, Susan. I’m genuinely honored to be here, and I’m not sure I would have been the first person that I thought of for this, but I’m happy that I see that you’re closing with my friend, Jonathan Adelstein tomorrow. And Jon—this is either pathetic or really cool, but Jon and his wife came to New York last Saturday night so we could go see the Allman Brothers together, who formed I think the year Jonathan was born, which makes him more successful in life than I am. Like I said, you can divide people by whether or not they think that’s pathetic or cool. I can go either way, and I was one of them. Just a tiny corrective matter—I’m no longer at Columbia. I’m now professor of journalism at the City University of New York, and I’m very proud of that. So I throw that in. It’s the first honest living I’ve ever actually had to make, to be somewhere at a certain time. It’s traumatic.

Okay. One thing I really like about this gig is nobody gave me any clue as to what I should say, and it's a good place for me to be in the beginning of the conference, because I don't have to pretend to know things I don't know about. You know? I can talk about what I do know about, and one hopes that that will stimulate further debate for the rest of the conference just in a sort of the odds are kind of manner that one of these things will be worth talking about later. Because the thing about issues in media ownership and media concentration is that you can kind of explain the whole world through them, but if you do you're going to miss important parts of it. In other words, the issues are so important and so central to so much that it's very easy for those of us who've spent a lot of time talking about it, and writing about it, and thinking about it, to think that if we solve these issues somehow we would solve our problems with the media and with our democracy, and that's not the case. I just wanted to sort of keep this in the back of our minds.

I wrote a column. I'm sure most people in this room remember. A little over a year ago when Ted Koppel was reading all of the names of the dead in Iraq, and there was only about 400 back then. Now it's up to about 1,100—no, 1,500. It's up to 1,500. So, Sinclair Broadcasting wouldn't run the show, and I wrote a column in *The Nation* saying, "Here is one more argument about why we need a diverse media ownership," because twenty-five percent of the country that has Sinclair Broadcasting is going to be denied this for clearly political reasons. And somebody wrote a letter to *The Nation* saying, "Well, that's kind of stupid, because it's Disney who Sinclair is censoring." And Disney is supposed to be the bad guy. They're Disney. They're one of the big six, and Sinclair is a relatively small player in this field. So if you had a lot of Sinclairs and no Disney in this case, you wouldn't be getting the news you wanted then. It's not all about media concentration from the standpoint of the marketplace of ideas in any case. Now, that contradicts the thrust of most of what I'm going to say, but it's just worth keeping in mind that if you're a liberal or if you're just someone who likes to see as many ideas at play as possible in public discourse, media concentration is an enormously important lens through which to view the problem, but it's not the only one.

That said, it is at a kind of crisis. I don't know how many of you are familiar with Ben Bagdikian's book called *The Media Monopoly*, that was the book that sort of introduced this issue as a political issue beyond the bounds of the expert field to the rest of the

world. It came out in 1983, the first edition, and he identified fifty companies which controlled the flow of the vast majority of information in the western world, particularly in the United States. I think he just published his seventh edition of that book this year 2004, and that number is down to six. From fifty to six. There's six companies that control the vast amount of what people see and hear in all of the various media. Now, that's a little bit misleading, because the information that these companies broadcast and communicate often comes from other places, and these other places are, family owned newspapers, like the *New York Times* and the *Washington Post*, which are relatively small players in business terms. As well as little magazines, like *The Nation*, and *The New Republic*, and *The Weekly Standard*, and *The American Prospect*, the *National Review*, and even some web logs play a role in the formation of these ideas. Nevertheless, the control point is in the hands of just six companies, and although the CEOs and the communications directors of these companies like to talk a very good game vis à vis the public interest. They sort of have to because they're given access to the broadcast spectrum by virtue of their alleged public interest commitments. You'd have to be very naïve to believe that their own personal interests are inconsistent with what most people would understand to be public interests. They have their own interests. They have their own corporate interests and they have all kinds of interests. And, the fact that there are only six of them is quite astonishing, because they're not all that shy about asserting those interests, whether or not those interests are consistent with their public rhetoric. And I'll talk about a few cases of that as we go on.

Now, the obvious problem with having only six major companies—and does everybody know which six companies they are? It's Bertelsmann, Disney, GE, Viacom, News Corporation and Time Warner. To just give you an example of how vast their holdings are, I have a list here. This is actually outdated. I just made a short list of what AOL took over when it engineered its takeover of Time Warner. That takeover's sort of been reversed. Now it looks like Time Warner took over AOL. But in any case, somebody took over all of these companies at once. This is what Time Warner was when AOL and Time Warner merged—It was Warner Brothers Pictures, Morgan Creek, New Regency, Warner Brothers Animation, Satellite Pictures, Little Brown and Company, Bullfinch, Back Bay, Time Life Books, Ox Morehouse, Sunset Books, Warner Books, Book of the Month Club, Warner Chapel Music, Atlantic Records, Warner Audio Books, Electra, Warner Brothers Records, Time Life Music,

Columbia House, Sub Pop Records—That's like Pearl Jam in its time—*Time* magazine, *Fortune*, *Life*, *Scofield's*, *People*, *Entertainment Weekly*, *Money*, *In Style*, *Martha Stewart Living*, *Sunset*, *AsianWeek*, *Parenting*, *Weight Watchers*, *Cooking Light*, DC Comics, half of Six Flags Theme Park, Movie World, Warner Brothers, HBO, Cinemax, Warner Brothers TV, Comedy Central, E!, BET, Court TV, something called the Sega Channel—I don't even have any idea what that is—the Home Shopping Network, Turner Broadcasting, the Atlanta Braves, the Atlanta Hawks, World Championship Wrestling, Hanna Barbara Cartoons, New Line Cinema, Fine Line Cinema, Turner Classic Movies—which by the way is the best TV station there is—Turner Pictures, Castle Rock, CNN, CNN Headline News, CNN International, CNN SI, CNN Airport Network, CNN FI, CNN Radio, PNT, WTBS, the Cartoon Network. I think that that was it then. Now I think it's expanded somewhat.

Now, the obvious problem with all of those properties, all of those communications entertainment properties being owned by one corporation, and only six of them being in play is the problem of the marketplace of ideas. Now, it's not just the problem. The way we're taught about it in high school. That you know, you need. All ideas need to be heard so that people can have a fair choice of what the best democratic solution is. It's a bigger problem than that, because depending on how you understand the way democracy operates and the way the role that the media plays in democracy. There are two models that I use when I try and think about this conflict, but I think they both are to some degree true. I forget whose definition of genius is the ability to hold two absolutely conflicting ideas in your head at the same time and not go crazy.

So on this very tiny issue we're all going to have to be geniuses. It takes me back to the debate between Walter Lippmann and John Dewey that took place when Walter Lippmann published *Public Opinion* I believe in 1922. *Public Opinion* is a blistering indictment of democratic practice as it's practiced compared to democratic theory. Lippmann argued that democracy was essentially impossible because the press wasn't up to the role of informing citizens with the kinds of knowledge that citizens needed to perform their functions as in choosing their leaders, that he compared citizens to spectators at the very top of a football stadium. They didn't have binoculars. They didn't understand the rules of the game. They just saw a lot of people running around doing different things, and had to make their decisions on that basis. Therefore, they were

enormously easy to manipulate with inflammatory rhetoric. Lippmann obviously couldn't imagine the world that we live in today with table news and talk radio. But you can imagine that if you don't have, special inside knowledge of the kind he was talking about, how are we supposed to know if Iraq really has WMDs? It's impossible for any of us to know that. And it's very easy to manipulate them on the basis of emotions and get really anything you want out of them. The media were really no help in this regard, because the media were not there behind closed doors to get the kind of information that policy makers had access to.

And so Lippmann basically declared democracy to be impossible. To be a waste of time. He said that that really wasn't so terrible, because people were more interested in results rather than in process, and if you gave them good results they wouldn't mind so much that they weren't really playing in the game. They were kind of fooling themselves that democracy was taking place at all. And nobody's really been able to puncture a hole in that argument in terms of its essentials. In other words, and I just gave you that little example, and I could give you any number of examples that are just really too complicated for people to understand unless they're unbelievably dedicated people who spend all of their time trying to do nothing but read, and read and read about something, and then they've got to find the right sources, and those sources have to be not fooled. How often do we find out twenty years later from historians that everything we thought about something twenty years ago turns out to have been based on misperceptions?

And John Dewey, who reviewed the book in *The New Republic* in 1922, and then he took five years later to respond to his own book called *The Public and its Problems*, and I think this Lippmann/Dewey debate is really after the federalists' debate over the Federalist Papers. I think it's the most important debate in the history of this country's contributions to political philosophy because Dewey didn't try and argue with Lippmann that citizens were competent to make these kinds of decisions based on the information that they possessed. He didn't take issue with this idea of what Lippmann called "omni competence." What he took issue with was Lippmann's model of knowledge. Dewey's great metaphor was, "You can be the greatest shoemaker in the world, but only the person wearing the shoes can tell you where it hurts." And he pointed to the fact that if you become one of these insiders as Lippmann called them, one of these special men and women—he wasn't being deliberately sexist at the time—then you develop your own set of interests and class identity that make it impossible for you to leg-

isolate or rule on behalf of the people with whom you can no longer identify. It's a kind of obvious observation about the way social groups operate. If you're in high school and you live with your parents, and you go to college and you have a whole different peer group, well, naturally you're going to start behaving differently to impress your new peer group rather than your old peer group by whom you're no longer surrounded. And so, then the model of special men and women breaks down because these special men and women can no longer identify accurately with the people on behalf they're sent to Washington to rule. You can see this in the media all the time. That when someone becomes the Washington correspondent for some hometown newspaper, and they stay in Washington for twenty years they become part of Washington rather than their hometown. They start to understand all these reasons why it's important not to tell people things that will only confuse them by upsetting their understanding of the world. Dewey said, "Well, this is all true, but it's not that terrible, because there's very few kinds of knowledge where it's really important to make a decision based on the facts of the situation" because there's some forms of knowledge like a baseball score or how many hits and errors were made, or, a flight schedule where it's very important to know what's happening when. But most of the kinds of decisions that body politics find themselves making are the kind of knowledge that you find deriving through various forms of communication and conversation. Dewey once said, "I don't know what I think about a problem until I hear myself say it." This form of knowledge that grows out of community conversation where people discover the truth rather than learn the truth is a much more valuable form of democratic knowledge. Because it implicates everyone in the community, even if it doesn't turn out to be the "right decision" it's a better decision because it speaks to everyone becomes invested in it, and it gains a kind of legitimacy that makes it true in Dewey odd sense.

Now, if we only have six companies giving us our information, and if the forms of participation that are open to us for democratic discourse are limited to these nonsensical shout fests that we see on cable news and on talk radio, and that to an enormous degree have come to dominate print media as well, then this form of Deweyed democracy becomes possible, and all we get is the knowledge that's passed down to us by our betters. Our "betters" who have access to the airwaves, and the internet, and television, and newspaper columns, and as we all know, that form of knowledge

has been enormously degraded over the past few decades. If you take a look at the number of the amount of space that Scott Peterson, and Michael Jackson, and Brad, whoever, and I always forget if it's Jen or J-Lo that Brad—you know what I mean. You see that we're being robbed, either through either model of democracy that you want to choose. I mean, it's hopeless. If you're a person with a job and a family it's hopeless. I do it for a living, so I get to spend all day trying to figure out what I think is true, and most things I have no idea. I just pick a few things where I think I know what I'm doing. We're robbed of substance in the Littman model, so that the knowledge that we feel we need to be competent citizens is not offered to us, and we're certainly impoverished by the Deweyed model of a culture of communication and conversation. And so under either model, democracy is kind of farcical so long as these avenues are choked off by this incredibly limited number of gatekeepers.

Now, that's a slight twist on the marketplace of democracy argument, but it's the obvious argument. Only six people is bad. We need more ideas in the marketplace. Any tenth grader can tell you that's a problem. What I try and bring to the party besides Lippmann and Dewey is some of the way of the culture, and how the media operates, and how this culture is affected by the concentration of so many different companies and so many different interests being conglomerated under the same roof, aside from the larger democratic argument, which again, I don't want you to forget, it's probably the most important argument, but it's also the most obvious. If you think about it. If you remember that list. I probably should have waited before I read that list. But if you think about that big list I just read you of those sixty or so companies that were under Warner Brothers rubric when they merged with Time Warner, you have to remember that every single one of those companies has potential conflict of interest for every single one of those other companies. So if *Time* magazine wants to write about any one of those companies, or CNN wants to report on any one of those companies, or anyone at *Time* magazine, or anyone at CNN, or any of those publications wants to report on something happening at any one of those other companies they have to think about: How is this going to affect my job, my boss. How are the corporations going to look at this. How is it going to filter down to my level once that happens? And, I can't do the math, but because there's some sort of regression analysis, you've got to multiply everything by everything else. I think. But it's almost infinite the level of potential conflicts of interest because it's not just the companies that

are underneath your roof, it's all of your competitors as well. If you report on a competitor of one your companies overly favorable that's going to affect your company. It's going to make somebody mad. And all of these people have girlfriends, and wives, and mistresses, and boyfriends, and children, and you've got to keep all of this in your mind. Remember the '96 election—Bob Dole's mistress was trying to get coverage, and she was calling up news organizations and trying to get coverage, and nobody would cover her. And the argument was, "Well, it was thirty years ago." I mean, this was, you know, I guess before we knew about Monica, because it's '96—yeah. So we knew about Gennifer Flowers. We didn't know about Monica. And the argument was, "Well, it's thirty years ago, it has no bearing on contemporary issues, and anyway, Dole's going to lose. If he were going to win, then it would matter. But since he's going to lose anyway why don't we just let it go?" A very top editor at *Time* and I were having lunch and we were discussing the issues, and in fact he had a funny line. He said, "Would you print it?" And I said, "Yeah, I'd print it. You know, it's not my fault that this has become an issue. I don't make the rules, but these kinds of things can become an issue." And he said, "Well, I'm the editor of *Time*. I do make the rules, and I'm not going to print it." But he said, "This is an easy call this not printing this." He goes, "I got a really tough call, which is that Nancy Friday has written another book, and I need to pick a reviewer for it."

Now, for those of you who don't know, Nancy Friday is a very fancy sex writer. I remember buying it when I was, like, nineteen. Her first book was called *The Secret Garden*, or *Inside the Secret Garden*. It was about women's sexual fantasies, very educational. But her second book was all about her own sex life. It was also about how great her husband was at performing oral sex. And her husband was Norman Pearlstein, the CEO of Time Inc. The number one man at Time at the time. And you couldn't ignore Nancy Friday's book, because that would be an insult to it. Yet you couldn't very well give it too flowery a review because it was obvious that you were reviewing everyone in the business knew who her husband was. And yet you had to make her husband and her happy in some way without giving them too good a review. It was a very complicated political task. That's the kind of example where there are maybe one hundred people in the world who understand this issue, and it's kind of a trivial because who cares what kind of review this book gets in *Time*?

But in fact, it's illustrative of all of the kinds of decisions that are involved, because the managing editor of *Time* magazine really shouldn't have to take his decisions anywhere. He runs *Time* magazine. And yet there are, as I said in that list, about sixty different companies that have to ask themselves this kind of question every time they set anything down to paper. And that's the most trivial level, but there are some of these questions that involve millions of dollars if they're done wrong. Every once in a while the public gets a whiff of what these look like, and it's kind of like one of those Japanese monsters where they're so big, and the movie so low budget that they only show them as tails swishing around and knocking over buildings. And they expect you to imagine what the rest of the beast looks like. The part that you see visibly in the media is only the tail, and the beast is really a lot bigger and scarier, and does a lot more damage. But one time I remember I saw that tail was when Disney took over ABC. I guess this was also in 1996, and on *Good Morning America*, which is ABC's morning show. Charlie Gibson interviewed Thomas Murphy, who is the Chairman of Cap City's ABC, and Michael Eisner. Charlie Gibson, give him credit, he said to these guys, he said, "Where's the little guy in the business anymore? Is this just a giant that forces everybody else out?" And then Murphy, who was Gibson's new boss, said this on the air—it's almost unbelievable—"Charlie, let me ask you a question. "Wouldn't you be proud to be associated with Disney?" I'm quite serious about this. On the air he read him his orders. Eisner was later quoted saying he didn't think that ABC should cover Disney at all. So you've got one of the six not covering this enormous corporation. It's certainly not covering it honestly. My friend, Michael Kinsley, did the world a favor when he announced—so that you wouldn't be able to mistake it—that when *Slate* was started and Microsoft funded it he made the announcement, "*Slate* will never give Microsoft the skeptical scrutiny it requires as a powerful institution in American society, any more than *Time* will sufficiently scrutinize *Time Warner*," which by the way *Time* doesn't admit to. No institution can reasonably be expected to audit itself. The standard to insist on is that the sins be sins of omission, not distortion. There will be no major investigations of Microsoft in sight.

Now, that matters when you're down to six companies. I mean, it matters more and more when you're down to six companies. Because who can afford to do the investigations of Microsoft? It's very, very hard to investigate media companies, because they're very savvy. They are media companies, so they're very savvy about how to present themselves to the media. I just had this incident where I

felt myself to be slandered by the *Boston Globe* in a way that I don't need to go into now. But because I am a media columnist if you slander me I'm going to make a lot of trouble for you. So I wrote ten or so altercation entries. I got the ombudsman involved and I got another media columnist to write about it, and then I wrote my *Nation* column about it. I called up the editorial page at the *Boston Globe*, or I emailed her, and I said, "I'm the columnist for *The Nation*, and I'm writing about how this obviously false [inaudible] got on your editorial page, which your ombudsman has already said is [inaudible]." And she replied that she wasn't going to talk about it, because it was an internal editorial operation, and she couldn't be expected to discuss that. And I said, "But if everybody said that there would be no *Boston Globe*. I mean, that's what we do for a living. We find out, you know. You expect everyone in the world to talk to you, and then you won't talk to anybody else. She didn't have an answer for that, and I didn't get an email back to that. But that's exactly what media companies think. They believe that they themselves should be immune to all public scrutiny, and the net result of this is that we have these enormously powerful forces. Again, they're not only powerful in an economic sense, as they obviously are, but they're powerful because these are the six companies that determine the content of our democracy, and they refuse to submit themselves to any form of scrutiny, and they're very good at avoiding it.

One-third of local TV news directors surveyed by the project on Sherman 2000 admitted that they had been pressured to avoid negative stories about advertisers or do positive ones. Well, that's just advertisers. Another 40 percent said that they didn't need to be pressured. That they just submitted themselves to self censorship, and you know, that if you add those two things up they get censored after they self-censor themselves. Then an awful lot of the story is not appearing; is not open for us to discuss. And you know, we don't know what that is, but you can see the results of some of this in the coverage of the Gulf War I think. I mean, you can't ever prove this kind of thing, but you can look at how that war was covered, how NBC, MSNBC got rid of Phil Donohue, which was its highest rated show, just as the war began. And there was a memo that was published saying this was a very bad image for NBC News to be presenting at a time when the country's demanding a patriotic face, and we're going to war, and soldiers are going to be dying. And at the same time that the war was taking place these companies were putting themselves before the FCC to get the

limits on ownership lifted so that they could expand/increase their levels of concentration in various localities. I'm sure you'll hear a lot more about that during the rest of the conference. And you know, they can say that it's inconceivable that these two issues ever crossed their mind on the same day. But how could they avoid it? How can you not when your livelihood, when your success, when the impression you create amongst your peers is how successful you are at increasing the stock price of your company—when that's really the only way that you're judged by your superiors—when the very people who are making the decision about whether or not you'll be able to do that are the same people who have an enormous interest in seeing you broadcast a story a certain way. It seems to me, I can't point to you and say, "I know, you know, that Michael Eisner told me to go easy. That ABC was going to go easy on the war and not let any of his people ask any tough questions of Paul Wolfowitz or Dick Cheney." But it's difficult to imagine that everybody didn't understand it. That you even need to say that. That these two things are somehow separable. Now, every once in a while we get an issue where it's quite stark. Where the self interest, the corporate self interest of other media corporations is specifically demonstrated in such a way that it's d** near impossible to argue that what's coming first are those corporate self interests rather than the ideal that we like to think of as the public interest.

A few examples come to mind that I think are illustrative of this problem, and it's kind of depressing to bring it up, because you hear about this kind of problem, and it makes you feel kind of helpless as to how to address the larger issue that it implies. But I'll give you three quick examples. I don't want to spend too much time on it. In 1996 as part of the Telecommunications Act rewrite, Bob Dole, of all people, wanted to be the good guy before he resigned as Senate Majority Leader, and he wanted to auction off the rights to the broadcast spectrum, which were estimated—nobody really knows, but they were estimated to be worth \$30—between \$30 and \$70 billion dollars that are, you know, belong to the taxpayer. And Dole got—he actually was quite—he was surprisingly dogged about wanting to do this, because he really got no support from any powerful interests in his party or any other party. And he was taken aside right before he became the Republican nominee and, as I said, withdrew his position as Senate Minority—wait a minute—is it Majority or Minority leader—Minority then—anyway, and they said, "Bob, you have to run for president. Who do you think is going to be broadcasting your campaign? How do you expect to communicate with the country? You know, are you going to

p** off the very people who are going to be carrying your message?" And I guess he didn't have to think about it all that long, because the broadcast rights were just given away, and the taxpayer got absolutely nothing for it. I'm more—I mean, that story is told. You can't really document the reason that Dole decided to reverse himself finally. The way he would say it is that he never gave up on his principles, he just wanted to be able to finish the Senate's business and have a record of accomplishment to run on, and you know, I'm sure that was part of it too. Nothing is ever true—and there's never any one reason for anything in my experience. But if you take a look at the legislation in the 1996 Telecommunications Act, which is the reason that independent radio was destroyed, because it lifted, again, the limits on radio ownership, and also did a lot on cross ownership, and it was a big battle, an enormous battle between the broadcast and the cable industries, which again, I'm not an expert on the inner workings of these things. You'll hear more about them from people who know a great deal more about it than I do. But I am an expert on the coverage of these things, and it's very easy to be an expert on the coverage of the 1996 Telecommunications Act, because there was none. The words "Telecommunications Act of 1996" were never uttered on the CBS Evening News, the NBC Evening News or the ABC Evening News. There was not a single segment on the Telecommunications Act of 1996 on any one of the network magazine shows. The only time the words were ever said were once on *Nightline*, so you have the entire basis of our media world determined in that act, and that act was—I mean, all the decisions that the FCC made down the road were based on the laws written in 1996. And again, the reason that there are no good radio now except satellite radio is because of the provisions laid out in that act, and it went completely uncovered in the television media.

Now, the people in television media will say, I mean, I've asked actually the anchors about this and they say, "Well, this is a MEGO story." MEGO is short for my eyes glaze over. They don't know how to make it interesting. And you know, they're under such pressure it's kind of a vicious cycle. They're under so much pressure to keep viewers that everything has to be exciting, and so if they cover things that are important then it becomes boring and people don't watch. And so what's the point of giving people their spinach if they're not going to eat it, and all they're going to do is go get fat on the pudding that somebody else is serving? I mean, it's a hard question to answer in the regime that we're living in, but nevertheless, it just

coincidentally happened to coincide perfectly with the interests of their corporate masters who didn't want any of this reported and didn't—the last thing they wanted was a truly democratic debate on the nature of our—the ownership of our communication system, because you saw the results when we finally got one in 2003 and 2004, and people came to understand what was at stake, the Congress was unable to do what it wanted to do. And the FCC ownership laws were revered in Congress, and the court battles are still taking place. So it's hard to believe that the fact that it was boring was the only reason that it was never reported.

I'll give you one more example, it's more recent, when the McCain-Feingold laws were passed, and this is one of the toughest battles. It's one of the only times really in recent years that the side with less money beat the side with more money. And it was really—somebody needs to do a doctoral thesis on how that battle was won. But you know, there was one provision, only one provision from the agreed upon comprised legislation that was stripped from the legislation in the final vote. You know what that was? That was the legislation that instructed the television stations to sell candidates commercial time at their lowest prices available. Okay? That wasn't—I didn't see that reported anywhere either, nowhere.

Now, if you think about it an awful lot of what's wrong with our political system, like I said, there's no one answer to any problem, but an awful lot of what's wrong with our political system is how expensive it is to run for public office. It only allows a certain kind of person to run for public office, and it forces that person to spend most of their time raising money, in addition to which it constricts the kinds of votes they're allowed to make. You know, you can't—every time you vote it's sort of like being one of—part of these media companies. Every time you make a vote you have to think about who you're offending, and what that offense will mean for the money you need to raise to buy the commercial time to run next time. Our last election cost a billion dollars, the 2004 election is estimated at a cost of a billion dollars. That money had to be raised. So what's at the root of that cost is the cost of television time. That's the vast majority of what it costs to run an election campaign. So it's no exaggeration to say that candidates spend most of their time raising money, and most of their time when they vote worrying about what those votes are going to have for the implication of raising money so that they can continue to keep their jobs. I always—you know, whenever I talk to liberal groups they always say to me, "Aren't these politicians awful? None of them are willing to vote on their principles rather than their interest." And I

say, "That's silly. This is their career. They're politicians. They're not going to vote themselves out of their own careers. It's up to you to make it in their career interest to vote the way you want them to vote. That's what—that's how democracy is supposed to work." But there's a bottleneck in the system when it comes to money. Because if it's not about votes, it's only about money, then you've got another dysfunctional aspect, crucial dysfunctional aspect of the democracy. And this dysfunctional aspect derives from the need to advertise on television. And that was the one provision that was not addressed. It's the most important provision, but it was the one provision that was stripped from the bill, and nowhere at all was it reported. And when the four network heads were brought before Congress and kind of slapped around for misreporting the 2000 election, you know, that night this issue didn't come up at all. Nobody raised it. You know, it was—it's the central issue in these guys' lives. I mean, the 2000 election was over with. It was badly done. I don't like it. But the central issue facing them was the fact that they were going to have to start—they were already raising money, a lot of them were already in debt, you know, poor John Glenn, is still raising money to pay off his debt from when he ran for president. I don't even remember when that was anymore. I mean, really, it's a terrible problem. And it all derives from this one aspect that the system can't deal with, and we can't even discuss it, because this problem of the interests of those conglomerates won't allow us to. It can only be discussed on the margins. I can't write about it all I want in *The Nation*, and to be fair, a lot of these issues get discussed on the right as well as the left. The coalition that came together to defeat Michael Powell's FCC's attempt to raise these limits even further was a left/right coalition, and in my guess, it was probably more of a right/left coalition. In other words, my guess is that the NRA's participation in it and the Christian Coalition's participation in it meant more to a lot of senators than did the Sierra Club or Friends of the Earth. I don't know that; that's just my guess. Certainly the fact that Jesse Helms was on board says that to me.

So should I finish up here? How long am I supposed to speak? Okay. Yeah, now, I looked at the group of experts you're having tomorrow, and like I said, the stuff I understand is largely about content. So I was going to say a few things about this battle over the FCC limits, and what you can expect from the new FCC chair, Mr. Martin. But I'm not going to do that, because I think if you want to ask me about it I can give you an answer. It's a pretty good answer. But you can probably get a better answer if you wait till tomorrow.

But I want to stick to this issue of content, because you know, the words “liberal media,” most people think they’re one word now—liberalmedia. By the way, here’s one thing, if nothing else you learn useful comes out of my talk, the word media is a plural noun. Does everybody know that? It’s a plural noun. The media are not the media is. It sounds funny, but it’s true. And it’s also very important, because the media are such a vast herd of unruly beasts that no matter what you say about the media it’s going to be true about one tiny little part of the media. And so, you know, Dan Rather made a mistake. You can read this anywhere. You’ll read it in the *Wall Street Journal*, the *New York Post* and you hear it on O’Reilly. Dan Rather made a mistake about Bush’s draft record, and this proves that the media is liberal and biased against Republicans. Well no, it doesn’t prove anything. It proves something about the practices of this producer, this group of producers who worked with Dan Rather on this particular story. But to say that something about CBS is necessarily true of *The Nation*, or the *New York Times*, or *Time* magazine, or the *Weekly Standard*, or the weekly *Star*, these are all legitimate members of the media.

So as I said, when you think about the media, and when you talk about the media you have to speak very specifically about which media you mean. So it’s complicated, because media is still the plural of medium. And we’re not talking about media in terms of media. We’re talking about which actor within the media you mean. And the reason I make such a big deal out of this is because, look, I live on the upper west side of Manhattan, and a lot of my friends work in the media, and everybody I know who works in the media has basically liberal social views, and doesn’t have particularly liberal economic views. Their views are somewhat to the right of the rest of the nation on economics, and somewhat to the left of the nation on social issues. Certainly issues that are crucial to the religious right. They are well to the left of the religious right. Everybody I know basically thinks a woman has a right to an abortion, and that gays should be allowed to get married, that you don’t teach evolution to children as if it’s true. That kind of thing. There’s no sympathy for any of that stuff. But on economic issues where reporters are, as I said, they don’t send their children to public schools by and large. They don’t rely on social security or Medicare or Medicaid. Their jobs can’t be outsourced. On those issues there is very little push back from any mass organization, and particularly from their corporation to question their views. I mean, these views are dogma within the corporations they work for, and they don’t get in trouble if their biases somehow slip through.

There's no one really to make trouble for them. Lately we've gotten a few liberal organizations who see that as their job, but they're very small, disorganized, compared to conservative organizations. Whereas on the issues where they believe themselves to have a liberal bias, social issues, on the one hand they're aware of it, on the other hand the corporations for whom they labor are extremely wary of offending their audience. I mean, you can see that, with lately this craziness about obscenity where the argument of the right seems to be that the media should be entirely deregulated except when it comes to saying dirty words and showing body parts. In that case it's almost like you have a Commissioner to decree what's all right and what's not all right. And so, on the one hand, you've got a set of biases that everyone's aware of. Everyone is keeping in the back of their mind that the corporate heads are keeping an eye on and ready to pounce on, and if somehow it gets past all these people then there are these enormous conservative organizations who exist for no other reason except catch this kind of bias being demonstrated. You know that on this FCC stuff literally over ninety-eight—over ninety-nine percent of the complaints about obscenity were generated by a single organization—[inaudible] parent resource something. And so, these people have, millions of dollars and they just monitor the media to catch liberals and to make trouble for them. And now that they've got the FCC leveling these enormous fines it's not just a nuisance trouble. It's real trouble. It's millions of dollars worth of trouble.

So even if the problem were that reporters were liberally biased, that problem doesn't necessarily translate into liberally biased news on the basis of how reporters see themselves reporting their job, a) they want to be professionals and objective, b) their bosses are worried about it, c) if somehow their bosses miss it you've got this enormous conservative structure ready to pounce, which has the quality of focusing the mind. But more importantly, it's not reporters who determine what gets reported in the news. It's editors and producers and owners. I got a quote here from Tom Johnson, who was the president of CNN and the publisher of the *Los Angeles Times*, and he says, "It's not reporters or editors, but the owners of the media who decide the quality of news produced by or televised by their news departments. It is they who most often select, hire, fire and promote the editors and publishers, top general managers, news directors and managing editors, the journalists who run the newsroom. Owners determine newsroom budgets and the tiny amount of time and space allotted to the news versus advertising.

They set the standard of quality and the quality. They set the standard and quality of the people they choose and the news policies they embrace. Owners decide how much profit should be produced from their media properties. Owners decide what quality levels they are willing to support, or how well or poorly they pay their journalists.” And you know, on the one hand, a) think about who the owners are. In the year that AOL and Time Warner combined, which was one of the least successful mergers in all of human history, Gerald Levin and Steve Case, who made the decision, took home \$241 million dollars between them in bonuses. That same year Michael Eisner pulled down \$73 million dollars. That was their one year. That was what they earned in one year. Now, ask yourself if these people are the kinds of people who are going to be sending forth aggressive investigators of financial and political malfeasance charged with, as the old saying goes, afflicting the comfortable and comforting the afflicted?

My friend, Harry Evans, who actually I should say is rather comfortable himself, points out that the problem with media organizations that are owned by these kinds of companies is no longer whether or not how to stay in business but whether or not they’re even going to stay in journalism. In other words, so little of what gets produced as “news” qualifies as journalism anymore. It’s pre-packaged entertainment. It’s promotional, and you can understand why, and you can understand all of the pressures are about avoiding anything difficult or controversial. When Michael Eisner refused to release *Fahrenheit 9/11* the reason that was given by Disney initially—they pulled back when they were criticized for this—but the reason that he wouldn’t allow this independent arm of Disney, Miramax, to produce it was that Disney World or Disneyland—whichever one is in Florida—had some issues before Jeb Bush. That it would hurt the company to get the Bush family mad at them at a time when, these issues were before them. That was the legitimate answer they gave. That was like the respectable answer they gave. Again, they pulled back from it. That was what Disney was saying in the beginning.

Now, you’re supposed to end these kinds of talks on optimistic notes. I will say that when I first published *What Liberal Media?* and I went out on tour for it right before the war began in 2003, it was a very depressing tour because I would give this talk, and I would actually give a more depressing talk than this one. I would tell you how long the average person sits in front of the freerepublic.com website, which is a really crazy right wing website, which by the way I give a clue—I give a quiz, but I’m at the end of my talk, so I’ll

move more quickly, is five hours and twenty minutes. And people would hear that and they would just want to give up. If these right wing nuts are sitting in front of these websites for five hours and twenty minutes emailing networks and hassling, writing letters to the editor, and hassling their congressmen, then the battle is just lost, you know, because liberals at least have lives.

But here's the part that's not so depressing. I wrote three books in eighteen months, or I published three books. One of them I spent eleven years on, which was my dissertation book, *When Presidents Lie*. So it doesn't really count. But I went on three book tours. The point is I went on three book tours in eighteen months. By the third book tour it was like a different world than the first book tour. Now, it's true that it wasn't quite different enough. But when I went out in the fall of 2004, and I went to speak in Florida in October 2004 and I spoke to 400 people in the Ritz Carleton of all places in Sarasota, Florida, and there were representative of [inaudible], and there were representatives of Move On, and there were all these bloggers there. There were all these institutions that had been created to try and bring some diversity of viewpoint to the discourse that two years earlier had been entirely 100 percent dominated by these few voices, which turned out to be largely conservative voices. Like I said, it wasn't enough, but it was kind of a different world. Now, I still admit that there's something very odd about the fact—nobody seems to think this is a big deal but me—but 59 million people voted for Bush approximately; 57 million people voted for Kerry. Now, in fact, more people in America—nobody ever notices—more people in America voted for Democratic congressional candidates than voted for Republican candidates. So Democrats got more of the Congressional votes than Republican votes. And yet not only do the republicans control all three branches of government, they control every single opinion slot in the broadcast media. There's no liberal pundit that has his or her own show on television where an enormous amount of conservatives have their own—when CNN wanted to have kind of a fair fight on *Crossfire* before they gave it a mercy killing, they couldn't—they had to go to two political operatives to fight the two journalists that they had hired. They had to. There were no Robert Novaks or Tucker Carlsons on the left at all. They had to go to Carville and Begala, who were pros, because the system had not allowed any liberals to rise even to that level. And if you notice this is a kind of a phenomenon that's unarguable, but interesting. That every time a liberal politician goes into the media that liberal

politician's job is to hide their liberal views. They have to become down the line—unidentifiable. They have to become politically neutered. Whereas when conservatives go into the media their job is be conservative. So you've got one side ready for a fight and the other side turning the other cheek. Well, the difference in the world today is that there is another side. That is, it's far behind. It's thirty years and hundreds of billions of dollars behind. But it's there, and it makes a big difference. It makes a difference in part because it could win. I mean, it wins small battles and it could win big battles. But more importantly, it makes people feel like they're not alone in the world anymore, which is one of the reasons I wrote with liberal media. To let people know that they weren't going crazy. That all this talk of the liberal media was nonsensical in a lot of ways, and politically understandable.

And so that's my optimistic statement for today. Yes, it's still Goliath, you know, and not even David, it's just like duh. But the battle has been joined, and the first step to solving your problem is admitting that you're having a problem. And that admittance finally was made sometime between 2000 and 2002. It's people who see the world this way, and I don't mean to speak [inaudible] see the world this way are not alone in the way that they were before, and therefore they don't feel as impotent, and so I just like living in that world better than I like the previous world, even though that other book sold a lot better than the next two. Okay, that's all. Thank you.

RYAN CALO: They just told me that they agreed to take some questions. We have ten, fifteen minutes, and the way they'd like to work this would be for you to raise your hand and wait for the microphone they give to you both because it'll be easier to hear you, but also because we're recording this event for posterity and we'd like you to have you on record. So if you have a question, first of all raise your hand, and Mr. Alterman will select whose question we'd like to take, okay? So are there any questions?

ERIC ALTERMAN: Sir?

AUDIENCE MEMBER: Your last comments about being optimistic, I'm wondering if maybe we can have a different perspective about this joining of the battle. Do you think it might be possible to actually cooperate in the way that you pointed out, that it was a left/right coalition or a right/left coalition on that last media issue? Might that have more potential for success than actually trying to fight against who we know is already in power?

ERIC ALTERMAN: If it's talking about this issue, then yes, absolutely. It's much more of an insider/outsider question than a

left/right issue. The people who have the power want to protect their power. I do think that the conservatives have a number of advantages in terms of corporate behavior. The corporate mindset being more sympathetic to conservative values than liberal values. But I also think these guys can call it flat and they can call it round, like, they would have all liberal hosts if they thought that's where the money was. In that sense, there's hope that the right kind of political and commercial pressure can open up this discourse, and they can see that—because the old model is collapsing, the old model of one market with, you know, one sort of God figure speaking to 40 million people at night, at once, or forty percent of the audience at once, that that is collapsing, and that liberals can demand their fair share of that market in conjunction with conservatives demanding that fair share of the market. And again, you can look at the way—you can look at the country and say it's evenly divided between center left and center right, or you look at the way people identify themselves, thirty-one percent of Americans say that they're conservative, twenty-one percent of Americans say that they're liberals. If you use the word "progressive" it goes up a little bit more. I still like the word liberal. So twenty percent is a significant number of people. It's twenty percent of 280 million people is a lot of people, and they're entirely without representation in the discourse. It's to some degree our own fault for that being allowed to take place. As I said, I do think a lot of these corporations who just happen to make money from liberals as conservatives, but the conservatives have been so much better at organizing themselves and demanding their piece of the pie that liberals have been left with nothing. And now that liberals understand the problem they have lots of opportunities. And the argument is not inconsistent with the same argument that conservatives make about their pare of the pie. And as long as they see themselves as aggrieved, then this coalition's possible. What I worry about is they're going to wise up and see that they already own everything, and then they just will—you know, no, let's not touch anything, because it's very easy to win these battles by inertia, which is what the administration is doing now.

AUDIENCE MEMBER: When Ben Bagdikian first published his book and looked at fifty large capitalist corporations running the media there was a pattern of coverage that you observed, and now we've got down to six. Wouldn't you agree that the pattern of coverage was pretty much the same when there were fifty, and now

that there are six, so that maybe you're barking up the wrong tree by counting the number of corporations?

ERIC ALTERMAN: No. I wouldn't agree. I wouldn't even begin to agree. So why would you say that it's . . .

AUDIENCE MEMBER: When there were fifty corporations, all of which were focusing on their central issue of protecting their ownership of the airwaves, and then they combine into a couple of corporations, they're still focusing on their protection of the ownership of the airwaves.

ERIC ALTERMAN: Yes, well this gets us back to the other great debate in the history of American political philosophy, which is the Federalist Papers, it's just really Madison's federalist tenet. If you have fifty different factions fighting over the public interest, then it's much more likely that you'll get a more expansive definition of what constitutes the public interest, because the factions will need to combine in all kinds of different ways, then none of them will be able to exercise the kinds of power that prevents certain issues or certain point of views that are significant from being heard and being acted upon if in fact that's where power lies in the system. But six can do it pretty easily. If fifty can't do it, six can easily do it. And that's the fundamental difference. I also think that there's good things and there's bad things about the changes that have taken place in the media, but I do think that one reason the so called liberal media argument has been so effective is that I do think in the '50s and '60s the elite media were more liberal than most people, and now they're more conservative. But because the conservatives are able to seize on this imagery and repeat it over, and over and over, they've given power to it merely through repetition, merely through insisting on its truth, and people keep hearing it over time and don't think about it. But I do think it had some truth back then. I do think that in terms of civil rights and in terms of economics, economics versus classical economics, the media were to the left. The elite media in New York and Washington were to the left of the rest of the country, and I think that's where a lot of the power comes from.

AUDIENCE MEMBER: If there were a Telecommunications Act of 1983 do you really think it would have been thoroughly covered by the media because there happened to be a few more corporate owners?

ERIC ALTERMAN: Well, if I said yes you wouldn't be able to disapprove it. I don't like to give snap answers to things I haven't thought about. But I can't imagine it would be worse. That issue might not be any better. But a lot of it's . . .

AUDIENCE MEMBER: I wonder if you think there are any First Amendment implications from your insights? Is there any way that the First Amendment protection of the press should be altered in light of all of these considerations?

ERIC ALTERMAN: Well, I'm not a lawyer, so I'm reluctant to get into that field. I mean, I'm among those who very much regrets the loss of the fairness doctrine. The fairness doctrine was a bit problematic in practice because it assumed that there were only two sides to every issue, and there are multiple sides to most issues. I remember when I was young and Barry Commoner was running for President, he would run commercials that would always say "b**" in them, because you weren't allowed to censor political advertising by law in those days. That was the only way he could get your attention, if he cursed. So all of his commercials had the word "b**" in them, because he wasn't covered by the fairness doctrine, because it only applied to either Republicans or Democrats. So it was problematic. But it was a much, much better situation than the one we have. And I actually have been asked to testify by the judiciary committee and minority staff about efforts to try and revive that. But again, who were you fighting when you're reviving the fairness doctrine? You're fighting the media industry that's making such a killing from the current situation which is dominated by one side. So in the real world, I don't really see how it's going to happen. I think the First Amendment issues become trickiest when you start. I mean, that's what those media CEOs all did when they were brought before Congress to defend their terrible coverage of the 2000 election was wrap themselves in the First Amendment and say, "How dare the government tell us what to do? We're free and independent." Which is true. That it's worrisome to have a government telling the media how to report on the one hand. On the other hand, if there is no countervailing pressure to the media corporations, where is it going to come from if not from the government? Who's big enough to fight it? I mean, I have, like, four different media columns, and I was able to be like a gnat on the behind of the *Boston Globe* when they destroyed my reputation and my opinion before half a million readers. Most people have nothing, you know? And there's no way to force the media. If the media wants to screw you in some way, there's absolutely no recourse for just about anyone. So if you're going to admit that these companies wield an enormous amount of power, and that this power is wielded in such a way that is has fundamental import for the way our democracy is—the health of our democracy—then unless

you're willing to use the government I'd have to ask you what else is imaginable. How else can you imagine addressing the problem? Like I say, I don't like that solution, but I don't have a better one.

AUDIENCE MEMBER: Would you mind giving us your opinion about blogs and whether or not blogs would fill sort of a role that might not otherwise be filled if we didn't have a concentrated media like we do?

ERIC ALTERMAN: Sure. I like blogs, because every time you give a talk to some committed audience someone always raises their hand and says, "What can we in this room do about this terrible problem?" And I used to say nothing, but now I say, "Start a blog." So it gives me an answer. Blogs are great, and they also suck. They're great because they are a form of democratic communication that is outside the structure of these six companies and all the other companies that act like these six companies, and they allow information to be passed in a Deweyied fashion. That's wonderful. The second reason they're great is because they allow for the introduction of information into the same system that the system would otherwise resist. So the system as it's practiced, and the people who are now telling you where your shoe hurts, where your foot hurts from your shoe were fine with Trent Lott saying, "Strom Thurmond would have been terrific if he'd won in 1953 and the country was still segregated by race." The journalists produced by the system had no problem with that, and there wasn't really any new information introduced by [inaudible] or Josh Marshall except to just repeat it over and over, and say, "No, it's not fine." And the next thing you know Lott's out of a job. It's forced the system to deal with information that the system would have preferred not to deal with. So those are the two things that blogs are good for. The thing that blogs are bad for is that they have even less amount of quality control or gatekeeper function than the traditional media, and it's nearly impossible for people to determine good information from bad information, because they're busy, and they don't know that drudge aspires to be eighty percent accurate, aspires to be eighty percent accurate. That he would print anything, you know. That most blogs that don't have any sense of journalistic responsibility. When I talked before about journalists knowing their own prejudice and seeking to offset those prejudices as a matter of their understanding of their professional obligation. I think that's a good thing. In this case it doesn't happen to work for my own prejudice, but I think that's a good thing. That's like the most unbloglike thing you can do, and so an awful lot of c** gets introduced into the system, that the system has not handled to dismiss

or distinguish between, and there has definitely been a net lowering of the standards of what kinds of information is broadcast in the major media since that has come directly through blogs. All of those stories about John Kerry allegedly having an affair with an intern were all introduced by blogs. There was no truth to it at all, but it occupied the media for a long time. So that, in many ways blogs accelerate the worst aspects of journalism, and that concerns me. But basically I think they're great, and they're great because they let people feel like they're in the game. They let people feel like they have a voice, and that's a terrible problem with our democracy. That people feel not only that they have no voice, but that they have no one to talk to, and blogs solve that problem. They will never replace journalism. Journalism's too expensive and it requires too many different skills that bloggers would need to work full time at to acquire, and would need to have resources to acquire. You can have a blogger in Baghdad who's giving you information that can turn out to be useful, but to set up a bureau in Baghdad, to cover every story that is deemed important, costs millions. It costs hundreds of thousands of dollars. It costs thousands of dollars a month. It's a real skill. It's a professional skill. So the idea that blogs can replace journalism is nonsense. But the idea that blogs can help keep journalism honest is a good one. It's just that journalists need to have a stronger sense of professional responsibility than they've shown of late, and all of the pressures unfortunately are pushing them in the other direction.

SUSAN DOUGLAS: This will be the last question.

ERIC ALTERMAN: Just for the record I'd like to say that no women in fact raised their hand, so don't yell at me later. Okay. We're going to extend it with two questions.

AUDIENCE MEMBER: This has been a wonderful talk with extremely important and interesting points, but then it feels very postmodern to go online and see that your blog is hosted at MSNBC, which is part of the big six. And I'm just wondering how you sort of make sense of that? I mean, if we want to resist the idea that you're some sort of token liberal for them which I do want to resist, then are we forced to draw the conclusion that maybe if there are liberals who make cogent and compelling and readable arguments they will find a market, even among this big six, despite, our sort of presumptions that the marketplace is going to force them out? Do you stand as a refutation of some of your own points?

ERIC ALTERMAN: I can't really answer the question as to why MSNBC chose me to be their only professional blogger. It's good for me, you know? It's a fun way to make a living. It's odd to me. It doesn't make really a lot of sense to me that it happened. But I would add that I am a blogger. I don't have my own show on television. No one's ever remotely considered for a minute giving me my own show on television. When I was in college I used to ask, like, Cornel West this question: Why, if everything you say is true how do you explain yourself? And he would say that the system produces little spaces for people who have energy to demonstrate the generosity of the system. You know? It's kind of a neo-Marxist argument. I don't need to explain it in neo-Marxist terms. I understand my job. I've never been politically censored on MSNBC, ever. And I benefit from the editing I get. I'm grateful for it. But I understand what's sayable and what's not sayable on MSNBC, and I don't say what's not sayable, because I'm invested in my career. I'm invested in the ability to keep talking. So if I were Noam Chomsky I wouldn't have this job, because I wouldn't be doing that, or I wouldn't understand, or I'd be above caring about such things. But you know, I'm not a refutation, because I play by the rules. Okay? Now, maybe I get to expand the rules a little bit by understanding what they are. And there was a period of time where I was the *New York Times* op-ed pages favorite liberal. They would always call me up whenever they thought some liberal outrage had taken place, and they would say, "Write it up," and we would fight over just how far I could take the argument. I wrote an article once; it was when I was just beginning. It was twelve years ago. I was beginning my book on presidential lying, and George. The other George Bush was president, and I wrote an article about presidential lying, and I identified one of Bush's lies, and they said, "This is all very good, but you can't call the president a liar. It's the rule of the *New York Times*." And I said, "But this is a piece about how Presidents exploit the fact that the media can't call them liars." And they'd say, "That's a very impressive argument to me, Eric, and I promise to tell all of my friends about it, and you can tell all of your friends about it, but the fact is either a million people are going to read you tomorrow or you can make copies of this and send it out to your friends." And a million people read me the next day without that argument, and I don't think that's the worse thing in the world. I understand. I mean, it's too bad, but I understand the world I live in. So I don't think I'm a refutation of what I say. I think I have made some sort of peace with the system, and the system has made some sort of peace with me. And the fact that I am

quite moderate on a lot of issues and conservative on other issues demonstrates the limit of that system.

AUDIENCE MEMBER: Thank you very much for your talk. It's been very insightful. I thought about one of the comments that you made that you thought the administration was benefiting from inertia. And I question that only because last week in the *Times* they covered the amount of coverage or infomercials being passed on as legitimate news pieces by the administration has risen immensely. And I think it's twice the amount that had ever been covered by likewise in the Clinton administration, and I wonder if you would comment on that at all?

ERIC ALTERMAN: You asked me to comment on the investment by this administration in phony news?

AUDIENCE MEMBER: Yes.

ERIC ALTERMAN: Yeah. I see that this story of all of the taxpayer funded money that's going into fake news releases that are being broadcast by a lot of local TV stations as part and parcel of the Jeff Gannon story and as part and parcel of the Armstrong Williams story—and the Maggie Gallagher story, and as part and parcel of the really thirty to forty year effort that the conservatives . . . I think these people are really conservative. I think it's an insult to conservatism to call that the far right in this country has launched to de-legitimate the act of journalism, to de-legitimate the act of holding powerful forces accountable for what they do in society. So, it doesn't surprise me that these things are taking place. Now, the main problem with this effort, and like I said, this is another part of the tail, that all we see is the tail is that the media are enormously reluctant to recognize it as such. That Fox News is an assault on the values of news as defined by the journalists who work for CNN and the other networks. But they don't see it that way. They just see it as the newest thing in competition, that they have to emulate. That they need part of their audience.

There were two reasons I wrote *What Liberal Media?*. The first one was so that liberals wouldn't think they were going crazy. But the second one was to defend journalists, honest journalism. Whether it be liberal, or conservative or nothing, against these forces that are seeking to undermine it by calling it liberal bias when in fact all it is trying to get answers from people who don't want to give them to you, because they're in positions of power. And there are so many ways in which this is going on now. There's so many different aspects to this attack on honest journalism that it's almost impossible to keep up with it. That is the genius of this

administration, that they've launched their war on so many fronts that you can't even believe it. You know, you can't. the *New York Times* can't cover them even if the *New York Times* were so inclined, because there's just too much. That's why I keep having to publish books. So it doesn't surprise me. You know, I got in a fight with some blogger because I read an article in the *New York Times* that raised the question as to whether or not some of these Iraqi blogs might be phony blogs that are put up by the administration for propaganda purposes, and this blogger said, "That's the most ridiculous thing in the world. I said, "The CIA, an organization that admits to overthrowing governments, to torturing people, to assassination policies and to having its own newspapers is going to say, 'No, no, we're too moral to have a blog.'" A phony blog? Well, the fact is, is that all of these efforts are part of the right wing effort in this country to assert its [inaudible] over the forces that it thinks are in its way. Some of these forces are genuinely liberal, but some of these forces are merely about democratic accountability. And this effort, this enormous investment, I mean, the administration rejected the ruling of the GAO, that said these were legal. They refuse to be held accountable in typically democratic ways, and the most important instrument of holding them accountable in our history has been the press, and so they're attempting to delegitimize the press through all of these different avenues. It's astonishing to me that the media won't wake up and see this effort for what it is, because you can't. Again, you can't fight something unless you recognize it as a battle, and this particular battle has not been joined. So thank you for raising that. Everybody go out and fight that battle too. Thank you.

PANEL I

A PERFECT STORM: THE BATTLE OVER
MEDIA CONCENTRATION

RYAN CALO: Hello and welcome. For those of you who don't know me, my name is Ryan Calo, along with Elizabeth Wei. We've organized this event. This is an event that means quite a bit to us. For those of you that saw the keynote last night, I at least thought it was a great success. It was a very interesting talk, at times controversial, and it really was a nice lead into today's events. I'd like to thank everybody for coming here. This is a great turnout and we have a wonderful room. And just so everyone knows, this is being put on as a sort of co-production between the *Journal of Law Reform* at the University of Michigan and the Department of Communication Studies, who have been just an invaluable resource to Liz and I. So I would like to start off then by introducing our dean, Dean Evan Caminker, who is going to say a few words of welcome, and thank you very much for coming.

DEAN EVAN CAMINKER: Good morning. I just wanted to issue a couple of warm words of welcome on behalf of the Law School, the *Journal of Law Reform* and the University of Michigan, Department of Communication Studies. I think this is going to be an incredibly exciting conference. We obviously know this is focusing on one of the most important questions of democratic governance, namely the ways in which an independent and vibrant and free press, and more recently, a broader range of media activities, can actually serve to make sure that our governmental system remains known to the people and accountable to the people. That is, of course, a subject that we've been talking about for two hundred years in this country. More recently we've started to focus on the question at the heart of this conference, which is not just the ways in which a free press can help maintain a democratic government, but the ways in which it is quite important for that free press or range of media activities itself to be accountable and democratic. We are focusing more and more these days on the question of whether or not the makeup of the people who constitute the media and the breadth of interests represented both at the ownership levels and at the participatory levels, whether or not we need to worry as much there about the democratization of the media as we do about the role that the media has in democratic government. I would like to invite another thought, which is to start thinking

about how does a particular issue of law play itself out across the globe? And I think it is interesting that, as this and other recent administrations have focused a great deal on trying to bring democracy to more and more governments around the world, there hasn't been that much attention paid, at least that I have seen, to the role that a developing press and media might play in those other countries. We talk a lot about elections, for example, but we don't necessarily talk all that much about the support that private media enterprise might actually play in new democracies in the same way it has played in our democracy for the last couple of hundred years. So I hope that some of the panelists today, or some of you in the audience, might spend a little bit of time thinking not just about how this issue plays out here at home, but also abroad. And I invite you to stay for all of the festivities today. I think we are going to have an incredibly wonderful and rich conversation, and again, I thank you very much for coming to Michigan Law School, and let's get on with the show.

Thank you.

RYAN CALO: I'm going to introduce the first panel, and I think that the moderator, Professor Van Houweling, is going to talk a little more about its substance. I'd like to first say that she's been a great help to us. She was a really wonderful resource at the beginning when we were sort of casting about for how to frame this event, and who to invite. She's just been absolutely wonderful, also, in helping with the funding proposal. I just want to thank her personally before I introduce her. In any event, Professor Molly Van Houweling joined the University of Michigan faculty in 2002 as an Assistant Professor after serving as a research fellow at Stanford Law School's Center for Internet and Society, and as president of Creative Comments, a non-profit facilitating sharing of intellectual property. Professor Van Houweling has also served as a Senior Advisor to the President and Board of Directors of the Internet Corporation for Assigned Names and Numbers, the company that oversees the Internet domain system, and as a research fellow at the Berkman Center for Internet and Society at Harvard Law School. Professor Van Houweling received a B.A. in political science from the University of Michigan, and J.D. from Harvard Law School. She clerked for Judge Michael Bowden of the U.S. Court of Appeals for the First Circuit, and Justice David Souter of the Supreme Court of the United States. Professor Van Houweling's teaching and research interests include intellectual property, law and technology, property and constitutional law. This year she is

visiting at the University of California Berkeley Boalt Hall. With that I'd like to start panel one. Thank you very much.

MOLLY SHAFFER VAN HOUWELING: Thanks, Ryan, and thanks to all of you for coming. Since I have been away in California this year I'm especially delighted to see so many of my former students in the audience, and it's nice to be back in Ann Arbor. Our first panel will focus on regulatory approaches to media ownership and consolidation. As you may know, the FCC has recently moved to relax some of its traditional rules governing ownership. That move has met with alarm from some in Congress, from many members of the public, and from some courts as well. We will put this debate and other recent developments in context this morning by hearing about the history of media regulation. We will hear a defense of the FCC's recent deregulatory moves and a defense of the public outcry against them. We will also hear how, at the same time that the FCC is deregulating media ownership, it is regulating heavily in other areas, including broadcast obscenity and even copyright. Each of the panelists will speak for about twenty minutes, then we'll give them a little time to speak to each other, and also have time for your questions at the end. We will end by noon if not sooner to give all of us plenty of time for a lunch break. We will start with Professor Russell Neuman, who is the John Derby Evans Professor of Media Technology in the Department of Communications Studies here at the University of Michigan and also a research professor at our Institute for Social Research. He recently served as Senior Policy Analyst in the White House Office of Science and Technology Policy. His recent books include *The Gordian Knot: Political Gridlock on the Information Highway*, and *Affective Intelligence*. Professor Neuman has also taught at the University of Pennsylvania, Harvard, Yale, and he was one of the founding faculty members of the MIT Media Lab. His Ph.D. is from the University of California at Berkeley; his undergraduate degree is from Cornell University. With that, let's get started with Professor Neuman.

W. RUSSELL NEUMAN: Good morning. I have twenty minutes, and the title of my little presentation is "Ten Things You Should Know About the Media Concentration Controversy." So I've got two minutes each. My strategy this morning is to try to be provocative, so I'll throw out a lot of things. I won't be able to defend them fully, but I'm assured that my colleagues on the panel and members of the audience will be able to both critique and, on occasion, support some of these arguments.

NUMBER ONE—THE LIBERAL CRITIQUE OF MEDIA CONCENTRATION IS CURIOUSLY SHORTSIGHTED AND HOPELESSLY ROMANTIC. I think we heard it in Eric's remarks last night, and I raised the question. You don't really think that there's any difference between 1983, when there were fifty media corporations dominating the airwaves and now there are six. And he argued, oh no, it was much better then. And I think that there is this romantic notion of media diversity—that was what we listened to when we were kids and listened to the radio and watched TV, and I think that it is romantic. I don't think there is any data to indicate that in fact there was more diversity. I would have to assume given channel diversity, in fact, there was less diversity of views, ideas and cultural experimentation in the 1950s when there were three dominating TV channels rather than now.

There is something I think that we can do historically, and that is to go back to the 1920s when we really didn't know what radio was. We thought it was ship-to-shore communications, and in fact, the early days of radio were dominated by amateurs broadcasting more or less anything they wanted, usually something on their Victrola in the garage. There was spectacular diversity and conflicting signals, and it was a very interesting time. And what happened between 1922 and 1928 is the corporations got together, divided up the airwaves, generated networks, and you saw a consolidation, a homogenization. So if you want to understand the dynamics of corporate capitalism and the diversity of voices in the marketplace of ideas don't go back and romanticize about government regulation in the 1950s. Go back to try to understand what happened in the 1920s and how some of the rich diversity we had originally in amateur broadcasting might be brought back to life—and, by numbers 8, 9 and 10, I'll get back to that issue.

The history of the media gives us some models for regulation, and I wanted to draw your attention to three traditions of regulations for three different technologies. The first is the tradition of common carriage. You can say anything you want on your telephone. There's no tradition of AT&T saying, "Wait a minute. That word or that idea isn't permitted on the telephone," because common carriage says, "Well, we're going to regulate access to being in the business of telecommunications, but given that one structural constraint, content is not regulated at all." The second media tradition of regulation is the broadcast regulation, and it's not just a free speech tradition. Because of the limitation of spectrum and the fact that only a few voices can fit into the public electromagnetic spectrum, there is a public trustee concept. And

it's the public trustee concept that we romanticize about where we had things like equal time rules and fairness doctrines. And my view differs from a number of my colleagues concerning the liberal critique of media concentration. I don't believe the fairness doctrine and equal time rule worked very well. I don't think we have a lot of evidence that there was a great deal of political diversity on the air, and to try to go back to the '50s I think is understandable, romantic, but not appropriate, or at least not optimal.

Finally, there's the free press tradition, ironically based on the notion that anybody who wanted to print a newspaper or pamphlet could and could compete with others. In every major metropolitan area there are more radio and television stations than there are newspapers, so the irony is what is a constraint of access to the marketplace is the economics of the newspaper business, not the spectrum. So the unregulated tradition of First Amendment free speech is ironically applied to the media that is the least diverse, at least in ownership and in the number of voices in any given marketplace.

NUMBER TWO—THE CONSERVATIVE DEFENSE OF MEDIA CONCENTRATION IS BESIDE THE POINT. By that, I mean that the bottom line is diversity. If you listen to the conservative defense of media concentration they say, "Well, the issue isn't diversity. The issue is profitability." Now, of course, they will say such things, as it is simply in their economic interest to wrap themselves in the First Amendment. But the bottom line is the bottom line. And, I think, those that would draw attention to the issue of diversity of voices should look at the economics of the media business and start to enter the debate on the real grounds that the defenders of concentration are basing their thinking, which is the market economics of diversity and the demand for diversity.

The conservative position is, "Well, let the marketplace decide," and that's beside the point because we know markets structured in different ways will generate very different patterns of diversity of viewpoint.

POINT NUMBER THREE—THE MEDIA BIAS DEBATE IS INEVITABLE, and I will add, unending. It is basic. It is a basic fact of human perceptual psychology that someone of a liberal political persuasion looking at the media will say, "My gosh, how conservative it is." And in fact, someone of a conservative political persuasion will look at the media and say, "Obvious liberal bias." And you can count them, numerous books on both sides, and people who want to think that

the liberal media are liberal are buying books that say, "Gosh, these reporters are liberal." And indeed, that's the fact of life.

It is a fact that the reportorial and journalistic culture recruits selectively those of a liberal political persuasion. And it is also a fact that the owners of the media are inordinately conservative in their political viewpoint. So what we have is a very interesting dynamic within the structure of the industry between the ownership and the traditionally independent professional staff of editors and reporters. But don't expect the media bias debate to go away or to change anybody's point of view.

POINT NUMBER FOUR—GROWING MEDIA CONCENTRATION IS A FACT. The number cited in Bagdikian's evolving series of books tell a story. There are now fewer media conglomerates owning more media outlets than before. Let's try to understand why. Why are the media putting increasing pressure, economic, political and back-room pressure, on the Congress and on the FCC to liberalize the ownership caps and the cross ownership, and move away from the cross ownership prohibitions? The answer is because what was a very comfortable oligopoly—a few radio stations, a few television stations, a few networks—has been shifted by means of the digital revolution to a much more open, wild west, competitive marketplace. So there is a lot more competition, and the natural response of an oligopolist to competition is to buy up every damn competitor they can find. And that's what happened to the telephone industry when the patents ran out in the 1890s for AT&T, and AT&T had to compete with other telephone companies. And there were literally in some towns four different phone companies, and you would have to have four different phones on your desk, because the phone companies didn't interconnect, and if you wanted to talk to somebody you needed to call in the right phone business. And between 1893 and 1913 Theodore Vail and his colleagues at AT&T bought up every competitor they could, and it just got to be too much. So that's when the Kingsbury Commitment was signed, and we shifted to not competitive telecommunications, but a regulated common carriage basis. So understand the way in which these issues are perceived by the owners, and deal with the psychology of the loss of oligopoly. If you want to try to deal with the net effect that isn't of much interest to the capitalist, which is the underlying richness and diversity of voices in our marketplace.

POINT NUMBER FIVE—THERE IS A CRITICAL WEAKNESS IN THE ANTITRUST REGULATORY TRADITION. The critical weakness is it's very hard to define what a market is in the domain of ideas. How do you measure diversity of ideas as you would diversity of owner-

ship? How do you understand when there would be a meaningful substitution of some other content or some other voice for the voice you've got? If you take the ownership cap—and I think we'll spend a fair amount of time today talking about the ownership cap—in the television domain it's based on a percentage of households in the United States, which isn't even close to being a meaningful measurement of the number of voices that would be available to any one individual. The original attempt of the FCC to protect localism and diversity was based on a market. That is the number of the radio stations an individual would be able to receive locally. And so, if somebody owned a radio station in one town, it's simply not competing with the radio stations or newspapers in another town 2,000 miles away, so such a regulatory regime was meaningful. But our current focus is less and less on the geographically defined marketplace. That's being shifted by the Internet and other media. Satellite broadcasting changed the whole definition of what a market would be. Maybe that will inadvertently and eventually bring a new relevance to this question of the ownership cap with the localism of broadcasting isn't as practically important in terms of limiting or defining the marketplace.

NUMBER SIX—RESEARCH ON THE EFFECTS OF OWNERSHIP ON CONTENT CONCENTRATION IS VERY CLEAR. The answer is that ownership is *unrelated* to media content diversity. Let me quote the very first words of Mara Einstein's book *Media Diversity* published last year. These are the very first words of her book,

"Consolidation of the media industry has been the focus of scholars and regulators for decades. The prevailing wisdom is that the more concentrated media industry the less diverse the communications landscape." Intuitively this seems to make sense. Few voices should mean fewer opinions, few opinions means less diversity. But when you look at the data across a variety of media, however, that is just not the case. In study after study scholars have determined that there is no proven causality between media ownership patterning and programming content.

The classic study in this tradition is a measure of musical diversity where somebody has gotten some definition of what is middle of the road rock and roll as opposed to adult contemporary rock and roll, and there are correlations between media ownership, chain ownership and private stations to see if there is a difference

depending on what control variables you find. Usually there's no difference. Gabriel Rossman at Princeton has done the most recent work in this area, and he found a very small, tiny, but statistically significant correlation where there was less programmatic and thematic diversity for chain owned radio stations. The other studies that have been done of chain ownership and the quality of local news coverage in newspapers, and their chain owned newspapers tended to have a higher level and a higher quality of local coverage, perhaps because they had the economic deeper pockets to support their local stations.

It'll be interesting to see if people are going to say, "Now, let's not let Viacom divide in two, because it must have been better the old way, so one Viacom must be better than two." It'll be interesting to see what the reaction is to the notion that because of market demands Viacom has decided that it wants to divide itself into two. It's also the case that we've seen three stations recently shift from large markets, including San Jose, Houston and Washington, D.C., and shift from playing one other version of rock and roll to Spanish language programming. So that was an interesting shift, by the way, all motivated by the market demand for increased Latino market—citizens in the market. Interestingly, all three stations are owned by Clear Channel, so it wasn't a case that chain ownership led to yet one more rock and roll station.

NUMBER SEVEN—IF NOT OWNERSHIP, WHERE SHOULD WE BE FOCUSING OUR ATTENTION IF WE ARE CONCERNED ABOUT DIVERSITY? I'd like to suggest four things to focus our attention on. First do everything we can technically and structurally to reduce production costs, because if you want diversity, then you want to make it easier for people, and communities, and smaller companies to produce video, text and audio, so the technology is working to support that, I think strongly. Second, is reduce the spectrum bottleneck and the distribution costs bottleneck. The Internet is a massive and wonderful response to that. Third, the biggest difficulty in getting diversity out there is audience awareness of diverse voices. There are all kinds of interesting things on the Internet that nobody knows about, and many people should. So the psychology, and the economics and the fashion elements of drawing people's attention to the wonderful diversity that's available on the web deals with a kind of a psychology that ought to attract our attention as much as media regulation. And finally fourth, if you want to see a diversity in content don't say, "We want seven different capitalist companies instead of six owning the media." Look for some other basis structurally, like the Pacifica Foundation, which is independ-

ent of educational or public broadcasting, and tries to generate content that's responsive to the community that supports the radio stations directly.

NUMBER EIGHT—LOOK TO THE NEW TECHNOLOGIES; THEREIN LIES THE ANSWER FOR MEANINGFULLY INCREASING DIVERSITY. Those of you that saw the *Wall Street Journal* on Thursday may have noted that one radio station went from a play list of forty records, which they played over and over again, to a play list of 1,400 records. Now, I'm sure they are all still in the same tradition of whatever it is, adult contemporary or urban rock and roll, or whatever they named it. And why did they do that? Competing with the iPod. It was public statement that people's iPod put all these different songs right next to each other because of the random shuffle element of the iPod, and so radio has to compete with the iPod, and that led in this is one case to some diversity.

NUMBER NINE—IF YOU WANT TO MAKE A DIFFERENCE, LOOK TO SATELLITE RADIO AND THE MULTI-CHANNEL SERVICES. They package all sorts of interesting and diverse content, because at the margin, to get you to subscribe they want to add one more element of diverse programming "at the margin." And one more rock and roll record isn't going to do it. But some Portuguese or some Chinese or some diverse programming will make a difference at the market to somebody else then who will say, "Well, that's enough different stuff, so I will subscribe to that multi-channel provider," so Sirius and XM radio, interesting model.

FINALLY, NUMBER TEN—LOOK TO THE PREMIUM CONTENT SERVICE PROVIDERS. Who is it in the television domain that's been doing the most experimental, risky and award winning stuff? The answer is, well, HBO—owned by a major media conglomerate, Time Warner. Why would HBO be more experimental than the networks? And the answer is they sell by the month, not by the Nielsen hourly rating. Their economics is based on monthly churn not hourly viewing. So, at the margin, once they've satisfied you with a couple of blockbuster movies, they want to show you something you can't see anywhere else. So there's a real structural capitalist base reinforcement of diversity that keeps HBO on the edge, and more HBO type programming media I think would have ten times the effect on diversity than shifting the number of conglomerate owners from six to seven or eight.

MOLLY SHAFFER VAN HOUWELING: It is interesting that we are having this conference as the Supreme Court is getting ready to consider the issue of peer-to-peer file sharing in the *Grokster*

case, which is interpreted by some to be a technology that could be useful for people who want to challenge bigger media companies. I hope, as a copyright scholar, that maybe we will have a chance to talk about that intersection. But first our next speaker is Michael Baumann, the Senior Vice President at Economists Incorporated, a research and consulting firm in Washington, D.C., where his consulting experience includes antitrust, mass media regulation and the calculation of economic damages. He has extensive experience analyzing the radio broadcast television and cable television industries, and his research has been submitted in numerous regulatory proceedings before the Department of Justice and the FCC. He has previously served as an economist in the antitrust division of the U.S. Department of Justice. His Bachelor of Science degree in economics and mathematics is from MIT, and his Ph.D. in economics is from Harvard University. Michael?

MICHAEL G. BAUMANN: Thank you. Good morning. I feel a little nervous up here being probably the only economist amidst what seems to be predominantly a group of lawyers. If you can imagine how a fox in a henhouse feels, well, I feel just the opposite. I'd like to discuss the FCC media ownership rules, and I want to consider what would happen if the media ownership rules were relaxed or eliminated. One should expect this to result in continued restructuring of media ownership, consolidation. One should also expect such a change to improve efficiencies of broadcast station operation, and to maintain or even enhance content diversity. One should not expect such relaxation to threaten competition in either the economic marketplace or the marketplace of ideas. Reliance on existing antitrust enforcement standards will protect the public from both the creation of market power and any undue reduction in diversity. This is because the application of the merger standards will stop acquisitions on economic grounds long before a significant reduction in diversity is threatened. This is true in part because the marketplace for ideas is broader than the markets the government uses for evaluating the competitive effects of mergers.

Let me first briefly discuss DOJ's approach to merger analysis, and how it applies to media competition, and then examine how this analysis applies to issues such as diversity and localism that the FCC's concerned about. Among economists there's a general presumption that in a competitive marketplace the self-interested actions of individuals and firms will lead to socially desirable outcomes in terms of the amount of goods and services produced. However, competition can be threatened if economic activity is concentrated into the hands of a few owners, a small number of

firms. The antitrust laws are designed to stop mergers and acquisitions that result in undue concentration. The Justice Department has developed a standard methodology to identify changes in ownership that can potentially reduce competition. Their horizontal merger guidelines are widely used in analyzing mergers, as well as other competition issues.

At the risk of oversimplification, let me summarize the process the agency goes through when evaluating the competitive impact of a merger. The core of merger analysis is market definition. You define a relevant market by identifying the overlapping products of the merging firms, and by identifying those products that are close substitutes. In simple terms, a relevant market for antitrust purposes is something that can be monopolized. It's the set of products such that if a single firm controlled their output, that firm could profitably raise price. In the media business what is being sold, i.e. the product, is access to an audience. The audience being comprised of viewers, listeners or readers. For example, a radio station sells access to its listeners to an advertiser.

To date the Department of Justice has defined the relevant market for advertising, and therefore for media, very narrowly. For instance, DOJ has determined the relevant market for radio advertising is just radio advertising. Other forms of advertising, such as television, cable or newspaper are not considered by the Department to be in the relevant market. Similarly, it has defined newspaper advertising as a relevant market, and while it has reviewed very few television transactions, it likely considers television advertising as a relevant market.

Having identified the relevant market, the next step is to assess the concentration of ownership in that market. Concentration is usually measured using an index based on market shares attributable to each owner, often using revenue shares. In evaluating the radio mergers, however, the Department of Justice also looked at share of a particular format, rock and roll; share of a particular demographic, men eighteen to thirty-nine; and share of strong FM signals. Hence, the Department's analysis of media mergers has focused on individual media advertising, and even on very narrow segments within those advertising media. Based on the results of their analysis, which includes factors other than just concentration, such as ease of entry and reduction in costs, the agency decides whether a proposed merger is likely to result in a significant decrease in competition. If so, the agency seeks to oppose or modify the proposed merger. Following this approach, the Department of

Justice opposed transactions that would not have violated the existing radio ownership rules. Similar antitrust enforcement can be expected if there is relaxation of other media ownership rules. For example, modifying or eliminating the local television ownership rule would not mean that DOJ would simply allow any two television stations in any market area to merge.

Now, there are three reasons usually put forward in support of the FCC's media ownership rules. First, to protect competition. Second, to preserve diversity. Third, to promote localism. Let me address each of those areas. The first reason given for the ownership rules is that they protect competition. In my view, the FCC rules are not needed for this function. Consider the television duopoly rule, which limits the number of television stations you can own in a market, or the television newspaper cross-ownership ban. It is possible, particularly in smaller markets with few media outlets, that competition would be significantly reduced if two television stations that now have different owners merged. Competition might also be reduced in specific markets if a television station merged with a newspaper. But these are precisely the issues of ownership concentration that the antitrust agencies routinely deal with in enforcing the antitrust laws. There's no need for a separate set of competition standards for the media, in particular, there is no need for these one size fits all restrictions such as the television duopoly rule or the cross-ownership ban.

Moreover, the rules on media ownership need not be more stringent than for other industries. From an economic perspective, there are roughly two reasons why firms merge. First, to increase their market power, or second, to lower their costs or increase their quality. Growth that lies within the merger standards is unlikely to confer market power, and disallowing such growth may impinge on economic efficiency. The old radio ownership rules provide a good example of this. The rules imposed an inefficiently small form of organization on the radio industry. The vast number of radio station transactions that occurred following relaxation of the rules, and the fact that most of the proposed transactions were below the levels that raise antitrust concerns, indicate there were substantial economies to be achieved by the consolidation of radio stations within a market.

Consolidation leads to savings in personnel, equipment and facilities. In addition, consolidation allowed for the possibility of an owner to achieve broader unduplicated reach by offering more diverse formats. By increasing the reach of the radio station groups and reducing the transaction costs of buying radio the owners

hoped to increase radio's share of advertising revenue. Similarly, television duopolies have helped increase the amount of local news and public affairs programming, helped to keep some television stations on the air, aided stations in financial distress and helped launch new stations.

Finally, I want to consider how the commission's protection of competition evolved following the relaxation of the radio ownership rules in 1996. Initially, the commission followed the revised ownership rules and granted some license transfers only to see the Department of Justice later challenge those acquisitions. While the one size fits all ownership rules do not create competitive concerns in some markets, they did in others. In response, the Commission altered its review process, at first waiting for clearance from the Department of Justice, and eventually working with the Department of Justice to establish a screening process based on the framework the Department of Justice had used. Indeed, the end result was that the FCC was duplicating the efforts of the DOJ. So the existing antitrust checks on competitiveness are sufficient, and separate ownership rules are not needed to protect competition.

The second claimed reason for the FCC's media ownership rules is to promote diversity. The chief focus of the media ownership rules is outlet diversity, that is, the number of different owners of media outlets. However, the FCC's real goal seems to be viewpoint diversity, or differences in points of view. Outlet diversity is used as a proxy for measuring viewpoint diversity. At times the Commission's also been concerned with content diversity, that is, the type of programming available, and the ownership rules can also impact that.

Let me first address viewpoint diversity. An analysis similar to that applied to economic competition can be applied to viewpoint diversity. In this case the product is an idea, so it is useful to literally think of a marketplace of ideas. The first step in the analysis is to determine the relevant market. That is, with respect to members of the potential audience for a given message—the consumers of the idea—what alternatives are available to them? What media can link speakers with audiences? It is extremely unlikely that any such market would be limited to a single medium. All media that expose consumers to viewpoints should be included when measuring diversity. These include broadcast television, cable television, radio, newspapers, the Internet, books, magazines and other forms of communication. For this reason, diversity markets are broader than antitrust markets.

The next step is assigning shares to each participant in the market. In the marketplace of ideas, what matters is the number of available information outlets, not the current popularity of an idea or the technology of transmission. In competition analysis, audience or revenue share measures outcomes, not availability. An analysis based on audience size may yield a very high concentration simply because society's tastes produced that result. Popular messages by definition will have larger audiences. But *ex post* shares say nothing about *ex ante* availability. When determining the level of diversity, should a radio station with a few hundred listeners count less than a radio station with a few thousand? I think the answer is no, because each source is significant. The rational way to measure share is to give each available source of ideas equal weight. It is availability, not usage, that counts. Unpopular ideas are the essence of diversity, and the less popular ideas of today may have the greatest importance tomorrow. Discounting media that are available to all, but because of consumer preferences garner smaller audiences, understates the level of diversity.

This is not a novel way to measure shares. The merger guidelines contemplate circumstances where revenue shares are misleading, and the Department imputes an equal share to each competitor. For example, this is done in a bidding situation where several firms may be vying for a bidder's business, and the competitive importance of the firm may not be related to how many bids they've won before. Similarly, a media outlet's ultimate importance may not depend on how many consumers currently listen to it.

In summary, the relevant market for ideas is broader than the economic markets the government uses for analyzing economic competition, and shares of the market are more equally distributed among the participants. It follows that the relevant market for ideas is less concentrated than the relevant market for economic analysis. For that reason, antitrust merger enforcement in the economic markets for media will tend to restrain ownership concentration long before it becomes a threat to competition in the marketplace for ideas.

Consider next the effect of ownership rules on content diversity. There is no assurance that increased outlet diversity increases content diversity. The characteristics of media make it difficult to presume that with a given number of stations content diversity will be greatest if all stations are separately owned. Half a century ago Peter Steiner made the point that some audiences would be better served by a monopolist than by competitors. Consider why this may be the case. If you have two single channel competitors they might

both seek to attract the same audience, whereas a firm in control of the two channels may program one to reach that audience and the second to reach a different audience. There's no general expectation that media mergers will result in an inefficiently narrow range of content.

It may be illuminating to examine what happened to content diversity following the relaxation of the radio ownership rules. In 1992, the FCC relaxed the rules allowing a firm to own two AM and two FM stations in a market instead of just one. What was the impact? According to a study by Katz Radio Group, there was growth in niche programming formats. When owners were limited to one station, each station in the market had to maintain significant audience share in order to survive. The result is that many stations sounded alike, each trying to appeal to the mass audience. Owning two stations allowed owners to program complementary formats since overhead expenses could be shared. A recent FCC study of changes in music diversity following the 1996 Telecommunications Act found that within a market diversity increased significantly across stations within the same format and for stations across formats. With regard to television duopolies there are also examples where they have promoted diversity in programming by allowing an owner to eliminate program duplication. So there's no presumption, therefore, that the media ownership rules help promote content diversity.

The third reason given for the FCC media ownership rules is localism. The concept behind localism is for stations to provide programming, including news and public affairs programming, that serves the needs and interests of their community. But media outlets already have strong economic incentives to respond to the needs of the local community. Greater responsiveness can lead to a larger audience, which in turn can generate larger advertising revenue. Local ownership is not required to achieve local responsiveness. Indeed, if local ownership were necessary, the FCC's ownership rules are very inefficient tools to bring it about. There is no reason to think that joint ownership of two television stations in a market would decrease localism. To the contrary, there's evidence that television stations that are jointly owned or operated are more likely to carry local news and public affairs programming.

Another rule that was mentioned this morning is that national television ownership cap. This rule does not bear significantly on any competition issue. Competition among television stations and other media outlets occurs at a local level. Competition in one local

market, such as Ann Arbor, is not reduced if one of the stations in this market is jointly owned with a station in another market, say Houston or L.A. As with competition, it's difficult to find any connection between diversity concerns and the national television broadcast cap. What matters to diversity is the range of viewpoints available to individuals. That range is not diminished when a local media outlet is jointly owned with another media outlet in another geographic area. No one has shown that lifting the national television ownership cap will lead to less localism, less diversity or less competition.

In conclusion, competition in media can be preserved using the antitrust standards without the need for one-size-fits-all restrictions, like the television duopoly rule, or the cross-ownership rule, or the national ownership cap. If, in selected markets, ownership concentration were allowed to rise to somewhat higher levels consistent with competition standards there's no reason to think that the associated amount of diversity provided by broadcast stations and other sources would be insufficient. No separate ownership standard based on diversity or localism is warranted. It's time for the FCC to abandon all of its media ownership rules. Media competing for eyeballs and ears will lead owners to promote diversity. Thank you.

MOLLY SHAFFER VAN HOUWELING: Our next speaker is Andrew Jay Schwartzman, the president and CEO of the Media Access Project, MAP. MAP is a non-profit public interest law firm that has led efforts to oppose major media mergers, to preserve policies promoting media diversity, and to ensure that broad and affordable public access to advanced telecommunications networks and the Internet is possible. Mr. Schwartzman has appeared on behalf of MAP before Congress, the FCC and the courts. In part in recognition of his recent work in the courts, *Scientific American* honored him as one of the nation's fifty top leaders in technology for 2004. He teaches at Johns Hopkins University and has numerous other academic and professional affiliations. He's also a widely published author and commentator on media issues. He graduated from the University of Pennsylvania and the University of Pennsylvania Law School, and I expect that we might hear, based on his experiences, a different point of view on the FCC's media ownership rules.

ANDREW JAY SCHWARTZMAN: I would hope so. Russ has covered some wonderful stuff, which I agree in part and disagree in part. It would take me twenty minutes to address them, so I won't do that here.

Dr. Baumann has rather usefully and straightforwardly presented perspectives that I can address in about thirty seconds. Since it's germane to what I'm planning to say, so I will do that. And I should warn everybody, I'm not a scholar. I don't do a lot of scholarly stuff. I'm an advocate, and what I'm going to say this morning—because this is an academic forum—most of the time I speak at academic forum I don't get very scholarly. This is as scholarly as I'm ever going to get, and it's not very scholarly. Bear with me, because it's going to seem to go off in an odd direction. But let's try anyway.

I've been struck by the conundrum posed by the kind of analysis that Michael Baumann has presented, particularly in the context of litigating in the D.C. Circuit, which is the court that matters most to the FCC, because it has exclusive jurisdiction over many of the FCC's cases, and by tradition and otherwise, winds up with a lot of the rest.

Those of us who were involved—and this was a team effort—in the thus far successful appeal of the FCC's media ownership rules were able to get it into the Third Circuit, where we unquestionably got a very different result than we would have gotten in the D.C. Circuit. That case, *Prometheus Radio Project v. FCC*, is now pending before the Supreme Court on *certiorari*. Our opposition is due April 1st. The Solicitor General has not filed a *certiorari* petition, although he did file a conditional cross-petition. It is expected he will file a full born opposition on April 1st. As a statistical matter, without support of the United States, it is overwhelmingly unlikely the Supreme Court will grant the *certiorari* petitions. If so, this case will be one of FCC Chairman Martin's first major challenges—dealing with the remand from the Third Circuit.

The conundrum is that traditional economic analysis, which is so focused on market structure, does not measure public opinion, something which is important in a democratic system. Indeed, one of the interesting things about the FCC's media ownership proceeding was the open disdain that FCC Chairman Powell had for public input. It didn't matter to him. His Media Bureau chief, who very much reflected the same perspective, famously told a high ranking contingent from organized labor who came in to talk to him about it (including the Newspaper Guild, AFTRA, SAG and the Department for Professional Employees of the AFL-CIO), that "I want facts, I want studies. I don't want any foot stomping. I want real information."

Well, if you're a labor leader, what you do for a living is foot stomp, and foot stomping matters. It's an expression of part of our democratic process. One man's foot stamping is another person's First Amendment right of assembly and petitioning the government for redress.

The disconnect is that The Administrative Procedure Act and the D.C. Circuit's jurisprudence, which focuses on the kind of analysis that you've just heard, doesn't have a lot of room for public opinion or, if you want to use the term, foot stomping.

That has always struck me as a conundrum: you measure the marketplace of ideas through the economic proxies that we just heard about, and you talk about the marketplace. But in the marketplace of ideas, you don't measure public opinion.

What I'm now going to discuss is how the Third Circuit managed to take public opinion into account, at least a little bit, in the process of granting a stay in the *Prometheus* case.

Now, to be sure, public opinion is reflected in the democratic process through the legislative process. People elect and lobby members of Congress. And Congress has looked at broadcast ownership. In particular, the national ownership cap, which has been discussed already today, was the subject of litigation. In 1996, Congress set the cap at 35%. After the FCC voted to lift the cap to 45%, and while the *Prometheus* appeal was pending, Congress again took legislative action, rolling back the cap to 39%.

Why 39%? Well, that's just the point at which it was unnecessary for Fox and Viacom not to have to divest any TV stations. And that's also part of the democratic process; if you're Fox and Viacom you can take care of yourself. But this was a legislative judgment, and it did represent operation of the lower case "d" democratic process.

Former FCC Chairman Mark Fowler, who was the architect of broadcast deregulation at the FCC, was very effective in accomplishing his mission. He is someone for whom I have much grudging respect for having accomplished a real revolution in turning around fifty years of FCC regulation. Fowler—actually it was his speechwriter—famously said that "The public interest is what the public is interested in." That is a very good snapshot of how the marketplace theorists look at these things.

Well, my thirty-second answer is that economists use the best proxies they can, and if the proxies suck, the economics sucks. The economic analyses that we heard today measure audiences or, more specifically, audiences that the advertisers desire to reach. Neilson and Arbitron market disproportionately undervalued peo-

ple who are too old, too young, or too poor to be demographically attractive. As a consequence, traditional econometric analyses do not accurately measure the needs of those people.

That is a fundamental flaw, because each American citizen has the same First Amendment rights to receive information, and the people who are not demographically attractive, if anything, have a greater need for service. Indeed, at another level, those of us who are more fortunate have need to insure those people are well-served, and to make sure that their views and perspectives are reflected in the media. After all, the people who wash our clothes, drive our cabs, bus our tables, clean our toilets and make our beds know more about our lifestyle than we do about theirs. Society as a whole will benefit if those views are portrayed in the mass media. The economists' proxies don't measure these things.

As I have mentioned, FCC Chairman Michael Powell said "I don't care, I don't want to hear this stuff." He didn't want to have public hearings even though there was a huge demand for them. Finally he relented, and had one hearing in Richmond, Virginia. But, the witnesses, including me, all came from inside the beltway. We all drove down to Richmond and testified in there, just the way we usually do in Washington. This was what Michael Powell called a "field hearing."

Later on, there was another wave of demands for public hearings when the FCC started to develop its so-called "diversity index," which became the centerpiece of the June, 2003 decision. This was a quasi-antitrust formula modeled after the Herfindahl-Hirschman Index (HHI), which the Third Circuit rejected on review.

Two million emails, letters, postcards opposing liberalized broadcast ownership limits didn't matter to Michael Powell. That meant we had to go to court. The fact that we successfully obtained a stay from the court of appeals was really critical, because the litigation wouldn't have mattered otherwise, even if it had been resolved on an expedited basis. There were so many transactions lined up waiting to go that by the time the appeal would have been over, the broadcasting industry would have been completely restructured.

This is what happened when we argued the stay before a three-judge panel. The court raised a very interesting question. The judges asked counsel for the government about the unusual number of public comments which were filed. They said "We're looking at the public interest here and the importance of whether or not to put these rules into affect. Don't two million comments matter?"

Doesn't that give you some caution in wanting to put these rules immediately into effect?" The FCC lawyer's answer was no. No, these comments don't add anything to the record, except that they're there. A lot of postcards that say, "Don't change the rules," doesn't really add meaningful information to the record.

Well, the court granted the stay. It's an unpublished one page order. It's really not worth looking at, because it doesn't say much, but for those who care, it can be obtained as 2003 West Law 22052896. The order is quite routine, citing to the Third Circuit's version of a case very familiar to administrative lawyers, *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958). What the Third Circuit held was that the public interest mattered and it granted our motion for a stay.

Now, this is a lesson for those of us who are practitioners. If you practice administrative law and if you do this with any kind of volume, you will find yourself repeatedly citing *Virginia Petroleum Jobbers* and its "four factor" test as to whether or not a stay should be granted.¹ The full citation, however, is *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958), as modified by *Washington Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1988). Most of the circuits, including the Third, have adopted the *Virginia Petroleum Jobbers* test. However, the Third Circuit had never had occasion to consider *Washington Metropolitan Area Transit Commission v. Holiday Tours*.

There are very few published cases on these issues because most decisions are quickly prepared one paragraph orders. That makes *Virginia Petroleum Jobbers*, which was issued in 1958, all the more important. It was an interesting panel, too. In addition to Wilbur K. Miller, who was known for rarely joining any other judges' opinions, it included Judge David L. Bazelon and Warren Burger, who were at the time leaders of the opposing factions on the D.C. Circuit

In 1977 along came *Washington Area Transit Commission*, which I confess I haven't really gone back and looked at in twenty years. However, the court asked about it during oral argument in our case. I racked my brains and was able to remember the holding, but this was lucky because it is the kind of thing you routinely cite, but you don't really look at very often. Chief Judge Scirica, a Reagan appointee, and Judge Ambro, who's a Clinton appointee,

1. See *Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) ("(1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? . . . (2) Has the petitioner shown that without such relief, it will be irreparably injured? . . . (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? . . . (4) Where lies the public interest?").

were very interested in the case and wanted to discuss it at some length. And, while it's not reflected in this one page order, this was really a critical part of their analysis.

The *Washington Area Transit Commission* decision was written by Harold Leventhal, who was revered in administrative law circles, and surely one of the great jurists of the D.C. Circuit. J. Skelly Wright, another legendary figure, and Roger Robb, perhaps less well known, but a very important judge. (Not irrelevantly, I might point out for this group that it was Roger Robb who unsuccessfully argued the *Red Lion* case before the Supreme Court on behalf of the broadcasters.) The decision begins by "We start with the familiar test in *Virginia Petroleum Jobbers v. Federal Power Commission*. . . ." So, you can see that by 1977 they were already saying, "Oh, the familiar *Virginia Petroleum Jobbers* test." What they said was, "The test is likely to succeed on the merits," which is typically the major point, "harm to the parties, balance of the equities and the public interest."

What Judge Leventhal did was to say in effect, "Boy, this is a complicated case. We've got 14,000 pages of record. Sometimes when there is such a big record, you can't really figure out the likelihood of success on the merits in a hurry." So what is supposedly the most important factor. But in this case Judge Leventhal said, "The harm to the public interest is so great that when we balance these four factors the public interest and the irrevocable harm is overwhelmingly in favor of a stay. In such a case we don't really have to reach a finding on every one of those four measures." On that basis, Judge Leventhal said, "We don't need to find a great likelihood of success on the merits, we just need to see that it's a plausible argument." And that's what the Third Circuit did. It adopted *Washington Area Transit Commission* in granting the stay, saying, "We don't have enough time to assess the likelihood of success the rules are going to be effective in four days, but we can see the harm to the public measured by two million people who think it matters."

I would add that the bipartisan coalition concerned about these rules reflected less than one percent of American society, but those two million people are a large proportion of those who regularly exercise their First Amendment rights. They are the ones who write Congress, who write their legislatures, who send postcards to the FCC. In the case of the NRA members, for example, they obviously care about their purported right to bear arms, so they utilize the First Amendment, who participated in this exercise.

Eventually, in ruling on the merits, the Third Circuit reversed the FCC. In its decision in the *Prometheus* case, 373 F.2d at 411, the court reprimanded the FCC for not adequately taking into account expressions of public concern and hearing what it is the public had to say, and directed them on remand to make sure that they did so.

So here we have a circumstance where the traditional D.C. Circuit oriented measure says economists and facts are the only things that matter. "None of this foot stomping" ought to matter in an inherently democratic process. And the Third Circuit said, "No, wait a minute, it does matter," and told the FCC on remand, "Figure out how to take these concerns into account. The metrics need to be re-examined." Now I could talk about the metrics later, and talk about some of the things Russ said, but it's a very interesting exercise and it poses a very interesting conundrum for us about how to accommodate public participation in the increasingly complex issues that we have today dealing with the federal administrative process, and how we accommodate the democratic process in that. As I said, that's about as scholarly as I get, but I hope it's a useful contribution to the day.

MOLLY SHAFFER VAN HOUWELING: Our final speaker is Professor Jonathan Weinberg, Professor of Law at Wayne State University Law School, where he teaches and writes about communications law and Internet law and policy. He has also been a scholar in residence at the FCC, a Fulbright scholar at the University of Tokyo, a professor in residence at the United States Justice Department, and a visiting scholar at Cardozo Law School. Before entering teaching he was a law clerk to both Justice Thurgood Marshall at the U.S. Supreme Court and then Judge Ruth Bader Ginsburg on the D.C. Circuit.

JONATHAN WEINBERG: Well, thank you. I've been incredibly impressed by how well everyone so far has given talks that were exactly twenty minutes long. I don't know if I'm going to be able to do that. So if I run over I'm apologizing now in advance. You've got a conference here that's about regulation and concentration of private power. What is the FCC doing, and what does it need to do in this area? What the folks who organized the conference are concerned about is withdrawal from regulation: The D.C. Circuit's eagerness for, and the FCC's cooperation, with the proposition that the agency should decline to take action against instances of cross ownership that would have been proscribed by earlier versions of the law. And for what it's worth, now, I'm one of those who in general favors reasonably robust concentration rules.

You can see the FCC stepping back from regulation in a bunch of key areas these days, often prodded by court decisions. The example that is most obvious to me is the agency's essential elimination of the unbundling and the interconnection requirements under Section 251 of the Communications Act, that folks had once relied on as the basis for telecom competition in the local loop. At the same time, it's worth making the point that the FCC is not withdrawing from regulation across the board. In other areas it's affirmatively regulating. Andy said he was going off in an odd direction. I'm going to go off in an odder direction by telling you a little about a completely different communications law issue, which is the FCC rulemaking on the broadcast flag that took place not too long ago. The FCC is invoking regulation there, I'd argue, not to combat concentrations of private power but indeed in aid of them. After I tell you a little about that, I want to talk a little about FCC regulation of cable TV, and then the nature of *Red Lion* and how Democrats and Republicans each disserve the public interest in their own way, and in the end I promise to tie it all back to media concentration.

So let me tell you about the broadcast flag. This requirement is a response to the entertainment industry's fears about the private copying and re-dissemination of programming it disseminates via digital broadcast television. Now, if you've got a regular analog TV set and a VCR today, you can make analog copies of the programming you receive. You can walk those copies next door and lend them to your neighbor. As a practical matter, there is nothing stopping you from selling them on eBay, and the world continues spinning on its axis. A lot of us figure that is a right given to us by God and the *Sony Betamax* case. You can indeed, make, a whole lot of copies if you have a dual deck VCR, but doing that by hand is awkward and time consuming. If you really want to make a lot of copies, you would want to digitize the analog stream by hooking your VCR up to a digital video camera or similar device. At that point, what you've got is a really, really, really, really big digital file that you can burn onto a DVD. It would be seriously hard to transfer that over the Internet, because it's so big. It would take forever, but you could do that too. And that's today's status quo.

Hollywood's been expressing a lot of concern about the same category of activities when it comes to digital TV. When a consumer gets a *digital* television stream, Hollywood explains, the signal's already digitized, so it's less trouble for a consumer with an appropriate device to make a copy of the file and redistribute it

over the internet or whatever. In fact, a file corresponding to a full digital TV broadcast is still as really, really, really, really big as I was saying a moment ago, so it's not clear how much redistribution could get done. Nonetheless, the content community—the major studios—have explained that the prospect of folks making copies of digital television programming is Very Bad, and I want you to hear those capital letters. Viacom, which owns CBS among other properties, told the FCC at one point that CBS would refuse to make any programming available in high-definition form unless a way were found and put in place to prevent consumers from doing any of that stuff.

This struck the FCC as a really quite serious problem. The background to that is that the FCC began the digital television transition a few years ago. The FCC gave every TV broadcaster an extra six megahertz of spectrum. The idea was that broadcasters would begin duplicating their analog programming in digital high-definition using the new spectrum, and we would all buy new high-definition TV sets receiving that digital signal and displaying shiny new pictures for us, and, in short order, the old analog stream would become entirely unnecessary and the broadcasters could give it back to the federal government, which would auction it and make scads of money. That was the plan. It hit several snags. One snag was that it became clear pretty soon that broadcasters might consider it a lot more efficient and profitable to do something with the new spectrum other than blowing it all on a single shiny new high definition picture—which, for reasons I won't get into right now, cast doubt on the agency's whole approach. More concretely it became clear that few of us in the consuming public were jumping up to buy new digital TVs. And unless we—me, you and everyone in this room—buy digital TVs then those new digital signals that the agency is making broadcasters emit are just going to be an expensive curiosity, and the analog spectrum is never going to get returned because the consuming public's going to continue to rely on it. Don't worry though. The money from selling it off is still in the Bush budget.

Against this backdrop, the studio's threat to refuse to make programming available for digital transmission was serious. It was in fact, an empty threat: Viacom made the statement I just quoted to you about the 2003–2004 season. It said, "We will not provide any high definition programming in the fall of 2003 unless the broadcast flag scheme is in place." Before you know it, the fall of 2003 rolled around, and we didn't have a broadcast flag scheme in place, and CBS continued providing all of its scripted prime time

programming in high definition, just as it had been doing for several years. It did so notwithstanding that there was nothing stopping consumers from copying digital programming. But the FCC took the threat seriously. It continues to take it seriously. The result was the broadcast flag rulemaking.

Okay, what is this rule? The broadcast flag rule attempts to ensure that content providers will continue to provide programming for digital TV, free of the fear of consumers doing stuff with it that the providers don't like. Here's how it works: Content creators include a marker, or "flag," on their digital broadcast streams. Cooperating computer and consumer electronics manufacturers build devices—TVs, digital VCRs, personal video records, DVD recorders, computer tuner cards, cell phones, iPods, what have you—that recognize the flag, and refuse to release the flagged file through a digital output to any medium or device that isn't "compliant"—that is, that will not itself refuse to release the file to a noncompliant device or medium. This means, in essence, that a consumer using such a device may be able to make a soft copy of a TV program on the digital VCR—or, say, a personal computer—but the VCR or computer won't be able to write the program to a disk, and the consumer will be limited in her ability to get the program onto any other machine.

But you see, there's a snag here. I said cooperating computer or consumer electronics manufacturers. What if we have one that doesn't cooperate? What if the consumer uses a TV set or computer that doesn't follow these rules, and can do things that aren't in this set? That's where the FCC provided the last piece of the puzzle. The last part of the puzzle is that under the broadcast flag rules, it's *illegal*—that is to say, against the law—to manufacture or sell any piece of hardware—the television, computer, PC tuner card, whatever—that doesn't follow the rules I've just described. So we have these ongoing proceedings where Tivo says to the FCC, "Look, we've got technology we want to put in our personal video recorders. Are we allowed?" And the FCC says yes or no.

I find this a distressing ruling as a policy matter in part because of some of the ways it parallels the issues in *Grokster*, the peer-to-peer file sharing case currently before the Supreme Court. In both cases, you can see the content industry seeking bans on the sale of certain technology, because that technology is thought to present insufficient safeguards against people using it to copy or redistribute works protected by copyright. That is bad industrial policy, and it's bad free speech policy. It's not a good thing to have the government

banning what's by its nature legitimate and useful technology for fear of the uses to which it might be put, forcing consumer electronics design—indeed, forcing computer design—into a particular box and limiting speech modes that might have been based on other as-yet-undeveloped-and-now-never-will-be technology. That's nonetheless what the agency has done at the behest of a particular industry segment, in an effort to protect existing business models and perpetuate the dominance of the established market players.

The broadcast flag rule, in fact, is almost certainly going to be struck down by the D.C. Circuit—not because of any of the policy concerns I just raised, but because it's got dubious legal basis. That is, it is by no means clear that the agency's got statutory authority to enact the rule. This is a little tricky: It's undisputed that there is no provision in the Communications Act giving the FCC authority to regulate consumer electronics in this matter. If we were dealing with another statute, that would be pretty much the end of the story. If there is no grant of authority, there is no grant of authority. An agency can't regulate in the absence of a statutory grant of authority.

It turns out, though, that when it comes to the Communications Act there's precedent for the proposition that the agency can regulate even without a statutory grant of authority, so long as the object of the regulation can be said to fall within the category of interstate communication in a broad sense. I don't want to go into this in too much detail now; the legal theory is called "ancillary jurisdiction." The broadcast flag case really helps demonstrate the problematic nature of Communications Act ancillary jurisdiction, and two members of a three member D.C. Circuit panel made it pretty clear during oral argument that they didn't think this was going to fly.

The FCC didn't invent ancillary jurisdiction, though, in the broadcast flag proceeding. That concept goes back to the FCC's early regulation of cable. Back in the day when cable was first introduced, the agency was concerned about cable's impact on broadcast television. It restricted cable systems from importing non-local broadcast signals; it was concerned that cable might threaten the "healthy maintenance of TV broadcast service in the area," and thus the public interest. And so it issued rules saying, "You can't bring in signals from across the country in the following circumstances." It issued those rules without any actual statutory authority to do so, and the Supreme Court upheld that in the *Southwestern Cable* case on an "ancillary jurisdiction" theory. When

cable operators moved from importing distant broadcast signals to introducing new channels carrying sports and feature films, the Commission saw that as a threat to broadcasting as well. We're talking about HBO now. And the Commission moved to forbid that.

The important thing to remember about the agency's early regulation of cable is that it was almost entirely wrong-headed: It was a 1960s version of the broadcast flag, protecting existing business models from new technological challenge. In both cases, there as in this one, the agency needed to rely on ancillary jurisdiction—that is, regulation without any actual statutory basis—because it was responding to new technological developments, and those developments tended to have not a lot to do with the categories in the old statute. But in both categories, I'd submit, the country would have been better off with the agency saying, "we don't have statutory authority" and waiting for Congress to reach a negotiated solution.

So you might conclude that so far I've painted for you what looks like a pretty clear dichotomy. Inordinate concentration of private media power, bad; diversity, good; robust—well, some—concentration limitations, good; broadcast flag and old-fashioned cable regulation, bad. It lines up pretty neatly.

And yet, here is where things get a little more complicated. Because that early cable regulation (bad, I said) actually was closely tied into early concentration regulation (good, I've suggested), they both came out of a particular understanding of what broadcast regulation was about. Traditional broadcast regulation reflects a set of attitudes that are real different from those prevailing in traditional First Amendment law. Core First Amendment law, I'd submit, reflects a set of philosophical preconditions. By its nature, it tends to reject concerns that material inequality, or unequal bargaining power, or private concentrations of wealth, are going to render the marketplace of ideas unfair or unfree. That stems from its individualist and rationalist premises, its rejection of government regulation except in really sharply bound and exceptional cases. Traditional broadcast regulation, on the other hand, from the outset reflected a basic fear that inequality of private power and resources could undermine citizens' free interaction. That is the fear of "unlimited private censorship" you see manifested in *Red Lion*—the fear that a few private licensees could "monopolize" broadcast discourse, making impossible—these are all quotes from *Red Lion*—an "uninhibited marketplace of ideas." And traditional broadcast law, therefore, directed the government to regulate

private broadcasters, through the “public interest” standard, as if they were freed from the economic marketplace and indeed from individualist motivations. *Red Lion* told broadcasters they weren’t classic first amendment speakers at all. They were proxies. They were fiduciaries, presenting “those views and values which are representative of the community.”

The premise of early communications regulation, in other words, was that broadcasters were shielded from the marketplace, supervised by the FCC, governed by the public interest standard, in a world of their own there. The concentration rules were part of that; you’ll note that the concentration rules, prior to 1996, were based solely on the public interest standard. They weren’t mentioned in the statute otherwise. There were a lot of advantages to that overall approach to broadcast regulation. The most obvious is that that approach recognized, as traditional First Amendment thinking doesn’t, the meaningful effects of concentrations of private power on the thinking process of the community. But there were also a whole lot of disadvantages. It became clear over time, in my view anyway, that the public interest standard was incoherent; that there was no way to give that standard meaningful content in a manner that didn’t impose unacceptable government control over speakers. It’s really, really hard—I’d argue, impossible—to cause a public interest obligation to make sense in a First Amendment world where it’s beyond the power of government to say that this speech is better than that speech (which is the basic premise of First Amendment law everywhere else). Even if an ideal government agency could make it make sense, the FCC demonstrated time and time again that the actual FCC couldn’t.

Now let’s come back to the cable rules. The Commission’s initial clampdown on cable was necessary, at least in part, to preserve the Commission’s vision of the nation’s being served by a network of local broadcast speakers, each serving the public interest and acting as a proxy for its community, shielded from economic pressure that would impede it from carrying out those roles. The new technology of cable threatened to upset old business models and make a hash of localism, and so the Commission had to save the broadcast status quo—and thus the “public interest”—from the encroaching forces of economics and technology. (Broadcasters, after all, were obliged by statute to serve the public interest, and cablecasters weren’t—so the Commission couldn’t let *them* be in charge). But that was a Bad Thing. Commission’s status-quo, public-interest-dedicated walled garden was small and stunted. Cable

was in the wings waiting to provide tremendous diversity, and the FCC was standing in the way.

Okay, so where does this all get us? It suggests that there are three ways for the FCC to approach the public interest—what it's supposed to be doing in these concentration rules.

Number one: It can approach it naïvely, as a search for the public interest. I'm short on time, so I'll just reject that as, well, naïve.

Number two: It can identify the public interest with that of predominant market players, in what I'll call the Republican style—that is to say, the theory that whatever is good for the communications equivalent of General Motors is good for America. The broadcast flag provides the example here. The broadcast flag rulemaking, after all, is *not* the modern analog of the old cable rules. It's not there to protect the current system from forces that would undermine the public interest standard. Rather, in a world where the philosophy is one of capitalistic competition, it rejects the economics of creative destruction in favor of support for the folks who have a lot of money, and lobbyists and juice.

Third approach: It can identify the public interest with that of a predominant market players, in the Democratic style—following the theory that government supervision of the broadcast world, in aid of causing its members to serve the public interest, requires protecting it from anything that would disrupt current market models and give power to folks who aren't statutorily required to serve the public interest. That's the old cable model.

Something notable about concentration regulation is that, over its history, it has shared *both* of those last two failings. At the outset, existing players in the broadcast world were small—there was no Clear Channel—and the Commission did its best to keep things that way, in the service of its old vision of the public interest. Today, the FCC's concentration approach has swung more nearly to the other pole. The demise of the public interest standard has meant a loss of support for all aspects of the old fashioned model for broadcast regulation and a swing closer to the traditional First Amendment rules, under which regulating concentration in the name of diversity is suspect from the get go. You couldn't do it, after all, in the non-broadcast world. Folks like Harold Furchtgott-Roth tell us that it's not rigorous. And so today you see Congress and the FCC quicker to identify the public interest in the Republican manner.

The job today for defenders of concentration regulation, in what I'll call the post-public interest world is constructing a rigorous,

pragmatic, diversity-based justification for concentration limits in today's media environment. You might figure that the Commission's job is to use those justifications in an analysis of public interest without regard to the needs and desires of dominant market players, making neither the Democratic nor the Republican error. The gentleman has refrained from holding up the stop sign but I'll just close by saying, I wouldn't count on that.

MOLLY SHAFFER VAN HOUWELING: I suspect that our panelists have given each other lots to chew on, and I'd like to hear them do that aloud. Before we have questions and answers from the audience, I want to start by offering the panelists a chance to rebut or reflect on anything else that they've heard.

ANDREW JAY SCHWARTZMAN: I very much want to get to the audience. I certainly could occupy the entire remaining time here addressing all of these points. Let me just make one or two quick observations. My first observation is I regret that my friend Robert Corn-Revere has just walked into the room, and missed the discussion of ancillary jurisdiction that proceeded in the last twenty minutes. Robert won a case about a year and a half ago involving ancillary jurisdiction that's kind of the flip side of the broadcast flag case. It was an FCC effort, however well-meaning, to protect an otherwise unprotected interest, requiring a video description of programming for the visually impaired. The court of appeals—thanks to Robert's persuasion—threw it out, because his client, the Motion Picture Association, didn't feel like doing it. My larger point is that, having criticized economists' proxies as being incomplete and, therefore, not very good. I will now contradict myself and observe that much of what we've heard involves the difference between theory and reality. Democracy and making judgment is a messy process and an imperfect process. How the FCC measures diversity, how the FCC measures concentration, how the FCC assesses its ancillary jurisdiction is always going to be imperfect. I say this as somebody who is often unhappy with what the FCC appeals its decisions. There is a sound reason to give a lot of discretion to the agency and give it the benefit of the doubt—give it a little bit of wiggle room in ancillary jurisdiction to address problems. The Communications Act is, according to the Supreme Court, "a supple instrument."² That broad authority has enabled the FCC over time to accommodate new technologies while Congress has a

2. See *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 593 (1981) (quoting *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940) ("[The public interest] serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy.")); see also *Nat'l Broad. Co. v. United States*, 319 U.S. 190 (1943) (holding that "public interest" confers broad powers upon the FCC).

chance to catch up and deal with them. That has on the whole been a beneficial process, and it's been at the cost of some abuses—like the broadcast flag. That problem is exacerbated in today's world of money politics where more and more frequently the FCC is responding to the people with—as Jonathan refers to it—the juice, and can lead to some untoward results. But, I do think that there is a reason to give regulators some latitude and the benefit of the doubt. Second, and the last point I will make, I agree with what Molly said. On March 29th there are two cases of import being argued before the Supreme Court, the *Grokster* case and the *Brand X* case. The *Brand X* case really addresses one of the things that Russ took for granted, which I hope we can continue to take for granted, which is common carrier principles of nondiscrimination. The Internet is not necessarily going to be the Internet you know if the FCC succeeds in reversing the Ninth Circuit in the *Brand X* case, which is also going to be argued on March 29th. Cable modem service will be transformed. Cable operators will be free to block, slow down content based on the deal. If Yahoo makes a deal with Comcast and you're a Comcast customer they could block Google completely. More likely, they'll sell Yahoo favorable caching. So Yahoo will come up a lot faster than Google. It may even be imperceptible, but you'll find yourself tending towards Yahoo, because it seems to work faster than Google. It's going to adversely affect localism, startups, entrepreneurs, and indeed, the innovation which has made the Internet so important for artistic and political expression, as well as an engine for economic growth and innovation. So we've got some very important issues ahead of us where the principles of non-discrimination will become very important in assuring that First Amendment values will be protected on the Internet space.

JONATHAN WEINBERG: Let me take a word here to say that I halfway agree on ancillary jurisdiction. My concern with ancillary jurisdiction is that it's bad statutory interpretation, and it's got no textual hook. It makes hash of the statutory structure. That's a problem. At the same time, though, there are all sorts of situations right now at the FCC where the agency is at least thinking of doing things I would like it to do for which it has no statutory authority and for which it needs ancillary jurisdiction. This comes up in the whole area of regulation of broadband platforms. There was a case not too long ago where we had a DSL provider down in North Carolina—it's a combined telephone company/DSL provider—that said: "You know, we don't really like our customers using

Vonage, using voice over IP; that's competing with our service. So let's just tweak our DSL so that voice over IP is no longer available." The FCC got them into a room with some rubber hoses and truncheons and two by fours and they agreed not to do that anymore. But the question is: Does the agency actually have authority to start wielding those rubber hoses in situations like that? Well, if they do, it sure looks like it is Title One ancillary jurisdiction authority. I think I've got a slightly different viewpoint from Andy's on the exact significance of *Brand X*. But there are certainly calls for the agency to implement net neutrality rules that would speak to the ability of the cable company to favor some services or applications over others in your cable Internet connection. If the agency's got authority to do that under the current statute, it's only by virtue of ancillary jurisdiction. So I've got all sorts of strong policy leanings favoring the agency so long as the agency ends up agreeing with me on what it ought to do. There is still the problem that no one appears to have ever given it the authority to do it.

MOLLY SHAFFER VAN HOUWELING: So for our question and answer period, we will be recording your questions as well as the answers. I believe there is a microphone to go around. We would like you to wait when you raise your hand for the microphone to get to you. So, while you wait for the microphone I want to start with a question, mainly I think to Michael and Russell. We have heard from you two both the claim that use of new technologies and the Internet in particular could provide the kind of diversity and competition that we're looking for and do better than regulation of ownership. We have heard now two different claims that the FCC is itself hampering, or at least not doing enough, to foster the development of those new technologies through net neutrality. And the hampering would be the broadcast flag. So do you worry about that? And do you think that the FCC needs to do a better job of paving the way or at least getting out of the way of the new technologies that you champion?

MICHAEL G. BAUMANN: Well, from an economist's perspective I think the less the FCC does the better. A lot of regulation was in place twenty, thirty, forty, fifty years ago. It was well meaning. It was designed to promote new technologies at that time, and now it's just outdated, and it's hindering new technologies of today. So I think we have to be careful about putting regulations in place that, while well meant for today's environment, we're not going to get rid of and we'll be here fifty years from now trying to figure out how to work with.

MOLLY SHAFFER VAN HOUWELING: Okay. I think the microphone has arrived somewhere, David, so go ahead.

AUDIENCE MEMBER: I just want to say that I'm in complete agreement with everything that Professor Neuman had to say with the exception of point six regarding diversity. I don't think the problem that concerns the people here is really diversity. I don't think anyone denies that we now are blessed with the ability to see every football game on Sunday as opposed to just the local one, and we can definitely see eight celebrity divorces being updated rather than four. And indeed, we can learn about the ancient Mayans and the far side of the moon. I think people are more concerned about the squelch button. I think they're more concerned about what our esteemed keynote speaker was talking about who, even though he won the George Orwell Award, never mentioned the term that Orwell basically lived his life around, which is [inaudible] collectivism. And if you read *1984* what Orwell was talking about was [inaudible] collectivism, meaning the tendency to all societies, not just ours, history always for eventually things to converge towards a pyramid, and as you get closer to the top of the pyramid you get interlocking families, directorates, whatever it is, and you get the [inaudible] of a society where you have the leading families and then you have everybody else, and whether it's an economic leading family or it's hereditary doesn't really matter. When you get to [inaudible] collectivism, George Orwell warned, you get the ability for people to push a squelch button, so then it's not a question of how much we're able to see, but the few key things that we are prevented from seeing and learning about. I think that's the core issue, and I'd like to hear the panelists address that.

W. RUSSELL NEUMAN: Well, there's a wonderful irony in reading Orwell today, because Winston Smith confronted this very large screen, and there was only one channel on the screen, and that came from the Ministry of Truth, and indeed, we now have large screen TVs, and the wire leads down the street, but it doesn't go to the Ministry of Truth. It goes to the cable company corporate headquarters rather than the government. What we've pointed to in the new media that I think is a very positive sign is that the capacity of governments in their own interest to control the flow of information from outside their borders to their country—the citizenry has been greatly limited. The two principal factors here are the Internet, which doesn't know where the boundaries are, the internet protocol sends the message wherever you want and from

wherever you want without any regard to broadcast spectrum or some kind of geographic distribution, and the other is satellite, and it's very clear that satellite broadcasting has had major effects on opening up ideas and speech in the Arab crescent for example. So I think the most important thing—where our attention should go—would be to try to facilitate international broadcasting and the penetration of not just the Internet, but broadband access to the Internet, and that every dollar, every hour, every student's attention to those issues I think would pay us better in terms of diversity rather than romanticizing about how great it was when the FCC tried to protect without I think even measurable success diversity through some kind of equal time or fairness doctrine rulings.

AUDIENCE MEMBER: Professor Neuman, I could be mistaken, but I think I hear you saying something slightly different from what I heard you say earlier. What you're saying now, as I understand it, is that there are developing alternative technologies which we should look to try to gain diversity. What I thought I heard you say during your talk is that despite concentration of ownership we have diversity. And you pointed to a variety of musical diversity to show it. I'm much more concerned with political diversity. I think within the next minute and a half off the top of my head I could pretty easily name you ten strident right wing commentators, and I mean nails on a chalkboard strident right wing commentators, who have either major network outlets, or major radio syndications. If you can name me three equally outspoken liberal commentators, I'll accept your point about the existence of diversity.

W. RUSSELL NEUMAN: Again, let me go to the broadcast perspective because there may be a thousand liberal or radical or communist or socialist commentators on the Internet.

AUDIENCE MEMBER: And you view those as fungible with broadcast at the moment?

W. RUSSELL NEUMAN: Okay. Not fully yet fungible, but increasingly—who thought that the iPod would represent a force that would generate musical diversity in radio? I think at the margin the limitation—and the reason it's not fully fungible yet—is the question of finding a voice that's there. Now, Air America is this very interesting experiment, and I listen regularly to Air America, which is this liberal counter channel to the dominant voice of conservative talk radio. And what I listen for most attentively is the commercial pod break, and I hear public service announcements on the pod break, and I'm concerned, because that means the ultimate survival of Air America—and the first I hope of what will become many voices that will raise the level of diversity on the air-

waves—is its commercial success, it's a commercially supported enterprise. And so every time I hear somebody selling venetian blinds or oil changes I'm pleased, because that means that there is at least enough listenership to make Air America commercially viable. And the reason that there are ten conservative talk show hosts and not an equivalent ten liberal talk show hosts has to do with the marketplace. If you could make money selling liberal media the networks would say, "I don't want that money." At the margin they would. That's one of the beauties of capitalism. If there was somebody that could make a network money by criticizing capitalism they'd say, "I'll take that money," rather than censor it. The tendency of us to see conspiracies where they subtly and not so subtly will constrain criticism of their views, I think, is an understandable concern, but not the reality of the marketplace.

PANEL MEMBER: You know, while we're here, Air America radio—they lost their Chicago outlet.

ANDREW JAY SCHWARTZMAN: Yeah. Let me just observe that confidence that the new technologies and the internet will achieve everything it can do may be misplaced for reasons we've already heard, and I've already spoken to. *Grokster*, *Brand X*, the broadcast flag all represent instances where constraints are being brought on the capability of the new technologies to fulfill all of their promise. And it is not preordained that information is free and that the technology and disruptive technologies will prevail. We're going to figure that out in the next year or so in the cases I've just cited, but there will be other instances as well. Digital rights management continues to threaten the capability of the technologies, and if Microsoft prevails with WMA as opposed to the iPod technology, and over time Microsoft tends to win, we won't have that same capability. So that's my cautionary note.

JONATHAN WEINBERG: Let me chime in with two points related to that. One relates to being tremendously excited about the prospects of the Internet for the system of communication. That point, which Andy just reminded me of, is that we lost a huge, huge opportunity with the webcast copyright license terms. We really had going there wonderful burgeoning competition to music over the radio; it just got shut down in the twinkling of an eye by both the terms and the amounts of the copyright licenses that were imposed in the wake of Copyright Royalty Tribunal ruins. The second point is that this discussion really does raise the question of why in the world are we worried about broadcast concentration rules? A lot of us still seem to be looking at broadcast markets as if

there were no newspapers in the world, there was no Internet, there's none of the rest of it. That's something that the FCC stepped away from in the last rule making. Indeed you might ask, why should we care about broadcast diversity as such, when they're just one information source? And the short answer is because they're bigger: because broadcast outlets in terms of audience reach are really, really big, and there is nothing else out there like them. If that weren't true, there would be no basis for treating broadcast outlets as anything in particular that we had to worry about. Russ was, extolling the programming on HBO. HBO's wonderful, and it's got nationwide reach. But HBO's numbers are little. HBO simply does not have the audience compared to, say, NBC, and that's not going to change anytime soon. Broadcast networks are big. They're more of the market than anyone else out there, and that's, I think, the reason we're all this room still paying attention.

MOLLY SHAFFER VAN HOUWELING: We have about five more minutes and a few more questions.

AUDIENCE MEMBER: Russell, like the first question, I agree with much of what you said, not all. I certainly liked your suggestions of things to be concerned with, though I would have added ownership concentration among them. But the interest in other structural forms of ownership, I think, if we really want a diverse world of communications we should be putting a lot more emphasis on that. But like the first speaker, the thing that concerns me most was your sixth point, the idea of ownership not having anything to do with diversity. In the early '90s I reviewed about fifty studies looking to see whether or not chain ownership or ownership conglomerates had an impact, and many of the studies found nothing but to the extent that there was an overall finding in the fifty studies I looked at, it was clear that ownership concentration reduced quality that was bad for the public. I note that since that time there's been a number of studies, some of them by a professor at your competing school, Washington State, Steven Lacy—the most recent one, 2003. I have his 1996 one with me because I was reading it on the plane. But his 2003 suggests that public ownership relates to two things, increased profit margins and decreased number of journalists hired by the paper. And other studies have shown pretty clearly that as the number of journalists you hire declines the quality of the paper declines. So then moving over into the broadcast area, Columbia Project for Excellence in Journalism studied broadcast stations and had ownership being directly related to the quality of news provided with by far the best news

being provided where the owner was in what it defined as a small group, which means that the owner owned from one to three stations and progressively got worse as the numbers increased. So though I'm not—in fact, this afternoon I'll argue that this isn't the right issue, but to the extent that one is concerned with quality, it's not exactly clear what diversity means with quality, that ownership may matter considerably. And so, I was a little bit concerned with your suggestion that all the studies show that there's no relationship.

W. RUSSELL NEUMAN: I stand corrected. There is some controversy in the literature, there are some findings. I cited one where there was a small positive correlation. It's the most recent I've seen. It's not yet published. It was done by a scholar at Princeton University, and after all these controls there was a slight positive correlation.

PANEL MEMBER: There's also a guy at Michigan State that, I think, found more. This was in the music context [inaudible] that the play list—not the diversity of formats, but the play list diversity—now this notion of going from forty to 1400—but where there's more concentration the play list diversity went down.

W. RUSSELL NEUMAN: There is increasingly cross media competition—radio competes with satellite radio, radio competes with Internet radio, radio competes with iPod, radio competes with downloading packaged things from the Internet. That's going to put financial pressure on radio, and they may fire disk jockeys, and they may fire journalists. So, I'm concerned about that, but I would be reluctant to say that the FCC should be in the business of dictating how many journalists every radio station or every newspaper ought to have. Don't try to protect diversity by some kind of numeric regulation of the quality or quantity of news.

AUDIENCE MEMBER: But if ownership regulation would do that and we get the jobs we want, wouldn't that be a good argument to have ownership regulation?

W. RUSSELL NEUMAN: My primary argument is that at the margin the correlations that Rossman and others have found are so small that you can spend a million dollars trying to change it from six corporate owners to seven, and that the net effect of that is going to be one one hundredth of an iPod effect or an Internet effect, and I think although it is justifiable, it is not a high payoff. I think putting all your energy into the *Grokster* case, or the *Brand X* case, or starting a new channel on the Internet called the Foot Stompers Channel with Andy as the lead coordinator would be a

much better path forward than trying again to take us back to the '50s and say, "What we really need is an equal time or fairness rule."

PANEL MEMBER: I'll take five minutes at lunch to tell Russ why I don't entirely agree with what he just said.

MICHAEL G. BAUMANN: If I could respond briefly to that, the studies that look at the quality of news are very subjective. You have people, academics, sitting around looking at this program and saying, "Is this good? Is this bad? Is it what I want to see?"

PANEL MEMBER: That's what the problem was, that they weren't subjective. They look at measures of resources put into it.

AUDIENCE MEMBER: The really right measure is a subjective one, and all these students of social scientists didn't know how to measure the right [inaudible].

MICHAEL G. BAUMANN: Well, I thought the Project for Excellence looks at the types of stories that were being carried, and whether they were good or not. But that aside, we looked at that study that was submitted in the ownership hearings, and you're right, if you look at the numbers they show smaller ownership groups have more quality as they measure it. If you look a little deeper you find that the difference is not significant, that if you take account of randomness in the data from a statistical point of view it's just not significant. And I think that's following up that you can find these things.

PANEL MEMBER: They found that as to the cross ownership where there's only a half dozen but not where there were hundreds of stations, which was the main part of the study. They dismissed one part of it on being significantly insignificant. The part that they didn't talk about in the report was the part that was significantly insignificant.

MICHAEL G. BAUMANN I have to go back and look at it again.

MOLLY SHAFFER VAN HOUWELING: We have one last question, and then we'll continue this discussion at lunch.

AUDIENCE MEMBER: Thank you all for giving us the benefit of your comments and expertise. I want to draw from something that was touched upon by Professor Neuman and another completely separate issue that was touched upon by Mr. Schwartzman. First of all, you mentioned just in passing the connection with the defense industry that the origins of radio had, and I think, not a lot of people are aware of the defense industry and defense department funding of a lot of communication research, which is what you had mentioned the FCC really wanted to see. And to what extent do any of you believe that the FCC exists as kind of what's been called

a weak link between the government and one way communications technologies to kind of temper the really violent criticism of government that could be enabled by such technologies?

PANEL MEMBER: On the whole allowing for its significant imperfections. Again this democracy s*** but it's the best that we've got. The independent regulatory commission model, which has some—excuse the expression—in this context, diversity built in, and some accountability is better and a better model than anything else I'm aware of, for all of its limitations and all of its excessive responsiveness to demagoguery in Congress, I can't think of something better than to have a multi-headed body with limitation and no more than a bare majority from one political party and some ability to have dissenters. I can't come up with anything much better, and it provides as much opportunity for a firewall than anything else I can come up with, and it's very imperfect.

AUDIENCE MEMBER: Should commissioners then be appointed by the very administration that media wouldn't be able to criticize? Shouldn't it be regulated by our enemy's best friend?

PANEL MEMBER: The FCC Commissioners have more independence than you're suggesting. And I'm a critic, and I don't like what's going on, but they have more independence than you're suggesting, and I can't figure out a way that we're going to get any more independence than that in this political structure. It's the best we're going to get.

MOLLY SHAFFER VAN HOUWELING: So my assignment was to get us to lunch on time. And I haven't quite succeeded, but I've given it a valiant effort. Before we thank our panel, will you two have logistical announcements before we get up. Just meet back here at 1:30? Okay. So we'll meet back here at 1:30, but before we leave let's thank our panel.

PANEL II
MEDIA AND FREE SPEECH: THE RIGHT
BALANCE FOR DEMOCRACY

RYAN CALO: Hello, and welcome back. I have a feeling some people are going to be trickling in, because we're getting back from lunch here. But we're going to go ahead and get started so that we're more or less on track. I've been extraordinarily happy about the success of this Symposium so far with the keynote and the first panel. I have to say that this particular panel is very near and dear to my own heart as a person who really loved First Amendment law. This panel sort of was primary in sparking the idea of this symposium based on the influence of the media on democracy and the role of the First Amendment. And so insofar as this goes directly to these issues, it is a very important panel, and I'm glad to see everybody here. I want to thank you again for coming. The moderator for this particular panel is Professor J.B. White. I've had the pleasure of having class with Professor White. He has a deep and a complex understanding of many things, including the First Amendment and has written extensively about it and about in general legal interpretation. I am extremely excited that he's framing this particular debate. So in the interest of time I'm going to turn you over to Panel II, and again, thank you very much for attending.

[Applause]

JAMES BOYD WHITE: Today we're going to hear four distinguished speakers talk about different aspects of the relationship between the media and free speech in a democracy. This is obviously a timely and important subject. One way to begin to think about it from the point of view of the First Amendment itself might be to recognize that most of the ways in which we talk about free speech in First Amendment courses, and in First Amendment discourse more generally, is to imagine individual human speakers—individual human speakers engaging in the free trade of ideas, or developing their autonomy, or practicing the kind of conversations that are essential to a democracy and so forth. This is the kind of speech which, as Voltaire is supposed to have said—although I don't know that he really did—that we would die to protect even if we disagreed with it.

But in fact, just as a matter of social fact, the world of public speech that we inhabit is nothing like that. It's dominated by mass media either functioning in what we think of as a journalistic way, reporting news perhaps accurately or inaccurately, and often

enough in an unthinking or pusillanimous way, or offering to entertain us, but at the price of our having to endure a lot of advertising. An important question thus presented: What is the relationship between this kind of speech and the First Amendment? Is this the kind of speech the First Amendment is meant to protect? How and why? What of the fact that this kind of speech may make other, more desirable forms of speech impossible, or it trivializes them? The fact that I can walk out of here and say on the street corner that I think President Bush or President Clinton is a dastardly traitor is of very little consequence if I have no audience, as I do not. [Laughter]

Yet efforts to create such an audience, that is to say, for individual speakers, for example, through the local public interest broadcasting, are miserable failures that you can tell by the rapidity while you skim over those stations while you were channel surfing. So what are we to do? We're about to learn how our distinguished panelists both define and think about the question of the relationship between the media and the First Amendment.

The way we'll proceed is this: Each speaker will have twenty minutes with warnings as the time expires; I'm going to enforce the limit if I have to with brutal rigor—standing up, making noise and that kind of stuff, because only if we do that will we have time for questions, which is very important. When we get to the point of doing questions I will recognize speakers, call on you, cut you off, rule you out of order and otherwise exemplify a proper attitude towards your freedom of speech. We have four speakers this morning, and I'll introduce them one at a time just as they speak. The first is C. Edwin Baker, who's the Nicholas Gallicchio Professor at the University of Pennsylvania School of Law. He's taught at many places, including NYU, Chicago, Cornell, Texas and so forth, was a staff attorney to the ACLU. He regularly teaches constitutional law, mass media law and related courses. He's the author of three books, *Media, Markets, and Democracy*, *Advertising and a Democratic Press* and *Human Liberty and Freedom of Speech*. Dr. Baker.

C. EDWIN BAKER: Thank you. It's a pleasure to be here.

In thinking about media ownership, whether media is too concentrated, whether media concentration is a problem, the reasons that you're concerned with concentration will necessarily determine what type of answer one would get. So the question crucially is what values are involved when one talks about media concentration. I'll just describe what I consider the three primary reasons to

be concerned with media concentration. I'll add one additional practical point and one additional structural consideration.

First, the single most important reason to resist concentration of media ownership comes from, I think, the meaning of democracy. True democracy implies as wide as practical dispersal of power within public discourse. Dispersal of ownership may empirically produce diverse content. Sometimes it does, sometimes it doesn't. But what's crucial is the dispersal of power, of influence within the public sphere. Not everybody will own a media entity, but you'll have more groups feeling more represented, more people, and you'll have more of a sense of it being a popular construction of democracy the wider the dispersal of ownership exists. This distributive value I suggest was probably the most significant background concern, consideration, or motivation that prompted nearly two million people to write a petition or email the FCC in opposition to their reducing restrictions on concentration. Without more, without considering anything more about empirical effects other than that the power's been distributed, you have an adequate reason to impose almost any limit on media mergers, and any policy designed to increase the number of separate owners of media entities. The Supreme Court, I believe, has approved essentially the propriety of this value judgment when it held that strict limits on media cross ownership were appropriate to prevent undue concentration of economic power in the communications realm.

Second—and also bringing in democratic theory—dispersal of media ownership provides two essential democratic safeguards, which I think are of inestimable significance. First, concentrated ownership in any local state or national community provides a possibility of an individual decision maker exercising enormous, almost unchecked, undemocratic, potentially irresponsible power within the public sphere. This power may seldom be exercised. For instance, exercising it might be contrary to the economic interest of that owner, but even if it is not, that would not be so important. A democracy shouldn't risk this type of allocation of power. It's like with separation of powers in constitutional law. These structural provisions protect democracy even if they slow things down a bit. They are a safeguard for democracy, for liberty. One structural way that a society can protect democracy—that we can prevent something that I've sometimes described as the Berlusconi effect—is to have a widespread dispersal of media ownership. Again, this structural value has been embodied in law. Almost thirty-five years ago the FCC stated it quite clearly. As it put it, I quote, "A proper objec-

tive is the maximum diversity of ownership. We are of the view that sixty different licensees are more desirable than fifty, and even that fifty-one are more desirable than fifty. It might be the fifty-first licensee that would become the communications channel for a solution to a severe social crisis." So one of the democratic—well, actually I've now merged them—one of the democratic safeguards is just preventing undue exercise of power within the public sphere. The second, suggested by the FCC quote, is that to have more owners provides more people who potentially can provide a check, potentially provide the exposés, that are important within a democratic community. So there's two different types of safeguards: a safeguard against concentrated power within the political order in democracy, and a larger number of watchdogs. This larger number is almost inherently harder to corrupt and is also more likely to take the initiative to make that type of exposé that democracy requires.

The third point I want to note is a much more economic consideration, an economic argument. Economic theory predicts that media markets will radically fail to provide people the media content they want. I've talked generally about this in the first third of my book, *Media, Markets, and Democracy*, but two economic points are particularly important here. First, one reason why media entities fail to provide what people want relates to what economists call externalities, both positive and negative. When the newspaper, when the broadcaster, exposes corruption, the people who benefit from that exposure include people that see the broadcast or read the paper. But it also includes everybody else in the community who get a better government, a better functioning society due to the media having made the exposé. But they don't pay the paper. The paper or broadcaster doesn't get any revenue from those people or from the advertisers who pay to reach the media's audience, so paper or broadcaster undersupply expensive-to-produce exposés. Other media content creates negative externalities—effects on people other than the consumers, like the person who gets beat up after the media shows too much violence that stimulates some violent prone person to engage in antisocial behavior. Those beat-up people are subject to negative externalities, which again the market does bring to bear on the media's decision making. The market systematically provides too much negative quality stuff, and too little positive quality stuff from the perspective of what people would be willing to pay if they each had an opportunity to pay for the portion of benefit that she receives. But the people that benefit from

the media that they don't consume, that they don't purchase, don't have any effective market mechanism to bring that benefit to bear on media entities. I suggest that the externalities produced by the mass media and the mass culture that the media helps construct are extraordinary in their extent. In fact, in my book I go through and classify ten or fifteen different types, all of which have varying magnitudes in varying contexts, some positive and some negative, but none of which the market brings to bear on media entities. Sometimes the externality relates to something that media does that does not produce any story to sell even to its customers. If the media's reputation for investigative journalism causes corruption not to occur, deters official or private wrongdoing, then there's no story to report, nothing to sell to its readers, so they just get only the boring day-to-day stuff. But that deterrence would be a tremendously important positive externality of a media ready to engage in investigative reporting.

Second, there's a lot of economic factors relating to the nature of monopolistic competition that, for our present purposes, I don't need to discuss here but that create distortions in media markets that don't apply in many other markets. One, however, is important here. A consequence of the nature of media—monopolistic competition in media markets—is that most media entities have an extraordinarily high rate of operating profits. Put this point together with the discussion of externalities. What would a policymaker want to do in response?

Ideally, if the media's producing high positive externalities depends on journalistic activities that it can cut, what a policy maker would want is for the media entity to spend some of these potential profits on journalistic or creative activities that produce high positive externalities but for which they don't receive compensation or adequate compensation from the market. Basically society needs media owners who are willing to accept lower profits on behalf of things like high quality journalism, high quality creative efforts. So if there was any way to predict which owners would be that sort and which would be the sort who will just maximize the bottom line, a policy maker should seek to get ownership in to the hands of the first group.

There's a number of reasons to expect that smaller owners, family owners, will be much more committed to quality journalism than corporate owners, publicly owned corporations. First is a sociological prediction. The small owner, the hometown owner, is more likely to respond to a diverse set of incentives such as the praise and status they receive from friends and others in their

community for acting as responsibly and professionally. Also, if an owner is involved with, or was once involved in the journalistic side of the enterprise, she'll likely have personal identity tied up with professional standards that she'll be as interested in maintaining as in increasing the bottom line. My prediction is that, in contrast, for conglomerates, especially public corporations, mid- and high-level executives will have more of their identity tied up with the idea of producing a high rate of return on investment, be able to take out higher profits. Moreover, the rewards they receive will be more based on this achievement. So this public or conglomerate ownership will more systematically lead to taking the money out as profits rather than "waste it" on journalistic expenditures that produce good only for the community.

So that is my sociological prediction. There's also a number of structural forces that will tend to push in the same direction. In a merger, the buying entity will be presumably the firm that can offer the most. It can offer the most. It will be the most willing and able to capitalize on the purchased entity's potential earnings. But once having paid, once having borrowed the money to pay, the purchasing entity will be locked into being profit maximizing in order to cover the cost rather than being profit wasteful in a way that produces good for the community. So both on structural and sociological grounds I suggest that people are more likely to get the media that they in fact value, and that's beneficial to society, from ownership dispersal than from ownership concentration, particularly ownership concentration that comes through mergers into public corporations.

The other consideration that I will note, which doesn't itself really go to the argument for why ownership dispersal is desirable, is a practical political consideration. In area after area, the laws best on media policy grounds are very controversial. People with even similar value systems can disagree about what type of policy is best. These issues need to be thought about and debated within, discussed, talked about in a democratic process. To the extent that a few major media corporations basically control the public sphere, the type of debate you'll hear will focus on choices that are most profitable to these already controlling media. Members of Congress and FCC Commissioners will be lead to be responsive essentially to the economic interests of these few corporations. Dispersal allows for a more honest development of the political debates about what media policy is best.

The final structural point that I want to mention is that the more deeply dispersed ownership is, the more ownership is by small media entities as opposed to conglomerates, the less structural conflicts of interest there will be. If a media outlet is owned by a company that owns a lot of other properties, it discovers, depending on who the owner is, that it benefits from putting on the evening news stories about the new Disney movie, or the new Disney theme park, or the new General Electric high quality nuclear reactor, or various other things in which its owner has an economic interest. Now, I'm not saying that smaller media firms will necessarily provide the best journalism, but they won't have as many synergistic reasons to undermine the quality of the journalism. Thus, a structural lack of conflicts of interest is an additional reason for opposing concentration.

Now, it's clear that my story hasn't gotten through to the people that have been advancing deregulatory policies—the people that claim that ownership concentration is not a problem within the existing order or that, to the extent that it is, will be adequately dealt with by antitrust law. Where did these people go wrong? Well, often their antitrust analysis is overly simplistic. There's been a lot of interesting debate within the antitrust community recently about the notion of First Amendment values as being an important concern within antitrust law—an article by Stucke and Grunes raised some interesting points along this line. But there's a more basic problem. The people who have been advancing deregulatory positions assume, I think, that the only values at stake are essentially consumers getting commodities that they value consuming. They have an essentially commodified notion of the value. If you look back at the concerns I mentioned above, they were essentially non-commodified values, values related to the quality of democracy, the way democracy operates. Only the third of the three, the economic point, had anything to do with the provision of commodities to people. And that point was about how the market systematically fails to work within the media sphere to give people what they want. It related to externalities, benefits or harms that people do purchase—that is, to values that are not successfully commodified but which most free market advocates like to ignore. But the primary concerns involved the need for non-commodified values to prevail over commodified values. In contrast, I think the deregulatory advocates mostly focus on only commodified value. Their assumption is that the sought after value must be diversity in viewpoint or content, things that audiences can consume, while the democratic concern is much more about diversity of ownership,

dispersal of power within the public sphere. This dispersal is not what people purchase. It is how the system operates, how the society is organized.

Second, many of the deregulatory advocates have a misguided view of the First Amendment. The D.C. Circuit says that any limits on ownership restrict the media entity's First Amendment rights to reach as many people as it can. The Supreme Court, when it took up structural regulation, said as long as it is a reasonable implementation of communications policy the government can limit ownership drastically. It can even treat different broadcasters or different newspapers differently from other broadcasters or other newspapers. Essentially the difference between the D.C. Circuit and the Supreme Court is a different conception of what the First Amendment is about. The D.C. Circuit basically sees the media as itself the ultimate bottom, the ultimate rights holder. The Supreme Court has seen, I think quite clearly, that the media are protected to serve a democratic function, to serve an open, democratic society. Although censorship is contrary to the openness of a democratic society, structural media regulation may or may not benefit it. There's no good theoretical criteria to know when a regulation does or when it doesn't. So, for the most part, as long as the judgments are plausible, Congress should have the power, or state government should have the power, to choose the structural regulations they think will serve democracy best. The Supreme Court has traditionally said that's fine.

The Court's view, I should note, implicitly recognizes something that it has repeatedly rejected saying overtly. Namely it recognizes that the press clause and the speech clause are doing different work in the First Amendment. My own view is that the speech clause should and often is about a notion of individual liberty. This goes back to Professor White's introduction when he talked about the difference it makes who speaks, a difference between an individual and an institutional entity, a media business. It is quite clear that they both have some rights. But the rationale and content of the rights may differ. The Supreme Court's been all over the map as to First Amendment theory. I've argued that the marketplace of ideas dominates in many free speech cases but others quite clearly rely on a notion of individual liberty. It was individual liberty at stake when the Supreme Court, for instance, said that a school child couldn't be forced to salute a flag. Frankfurter's dissent said, since the children and their parents can talk about their objections after the salute, there was no interference with the marketplace of

ideas—if there had been, he would have favored their claim. Frankfurter didn't see what First Amendment values were at stake. The Court, though, thought that that child's individual expressive liberty was crucial. The speech clause often does and should protect this individual liberty. The press clause, though, is different. The Court has said this in a variety of opinions and in various ways. I think Justice Black did it most eloquently in an early antitrust case, the *Associated Press v. United States*. Black saw that the value of the press is primarily to serve our democratic needs for open and diverse communications. From this view, structural regulation is fine when it represents the view of Congress that the regulation is likely to that service—not to censor the press, but to improve its performance of its democratic functions. The court should and has upheld such regulation. So that suggests that the press clause is playing a different role than the speech clause. Often times the two roles will overlap completely. Both object to censorship, to content suppression. But in other contexts, they often differ. The notion of structural regulation of the individual is not really very coherent. Structural regulation of the media area makes a lot of sense. And it is done, and is legitimately done under the press clause, in order to make the media serve democracy better. Thank you. [Applause]

JAMES BOYD WHITE: Our second speaker will be Robert Corn-Revere, who is a partner in the Washington office of Davis Wright Tremaine specializing in First Amendment, Internet and communications law. He successfully argued the *United States v. Playboy Entertainment Group* case in which the U.S. Supreme Court struck down Section 505 of the Telecommunications Act of 1996. He's co-author of a three-volume treatise entitled *Modern Communications Law*, published by West, and editor and co-author of the book, *Rationales & Rationalizations*, published in 1997. Mr. Corn-Revere.

ROBERT CORN-REVERE: Thank you. It is a thrill to be invited to an academic conference. Usually working lawyers like me go to industry trade shows and similar events and not ivy tower gatherings to talk about these great ideas. In addressing today's topic, most of what I have to say may seem off the wall to you, in that others on the panel will address the disease of media concentration to be cured, if, in fact, there is one. However, I am going to talk more about the nature of the cure, and, more specifically, the FCC's media concentration proceeding and its implications both for administrative law and the First Amendment. Is the cure worse than the disease? Perhaps somewhere along the line, we can find out where I went wrong in my analysis.

Our moderator opened the panel by identifying various kinds of speech, both good and bad, and asking whether these types of speech were intended to be protected by the First Amendment. Professor Baker addressed the question in a somewhat different way when he said that the benefit of the First Amendment is not just giving consumers what they want, and that doing so is just “commodifying” their values. With all due respect, however, I think these are profoundly incorrect questions to ask when addressing the First Amendment. The purpose of the First Amendment was to limit the government’s power to decide what values we are supposed to have, whether “commodified” or otherwise. Vesting the government with the power to regulate speech in order to get the “values” that you want simply is antithetical to the purpose of the First Amendment.

In this presentation I will address some of these issues by focusing on the FCC’s media ownership proceeding as a case study on the death of the FCC as an expert agency. The problems of that proceeding go far beyond the media ownership context, and have significant First Amendment ramifications in other areas within the FCC’s jurisdiction. Maybe it is a bit dramatic to suggest the “death” of the FCC as an expert agency. Obviously, it still exists as an independent regulatory commission. But I think it pays to go back and look at what was intended when the independent regulatory commission structure was first established. The first such commission was the Interstate Commerce Commission established in 1887, and it formed the template for the agencies to come after it. The next was the Federal Trade Commission in 1914, followed by a host of New Deal agencies in the 1930s. The Federal Communications Commission was created in 1934, as we all know, and it expanded and consolidated the agency that was created in 1927, the Federal Radio Commission. The FCC wasn’t really different in kind from the FRC, just different in scope. At around the same time the FCC was created, Justice Sutherland described the nature of the independent regulatory commission as follows:

The Commission is to be nonpartisan, and it must at the very nature of its duties act with entire impartiality. It is charged with the enforcement of no policy except for the policy of the law. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative. Like the Interstate Commerce Commission its members are called

upon to exercise the trained judgment of a body of experts appointed by law and informed by experience.

At about this same time, the Brownwell Commission was advising President Franklin D. Roosevelt on the nature of the administrative state, and it described independent regulatory commissions as a "headless fourth branch of government." The reason for this negative assessment, of course, was that the "independence" of independent regulatory commissions necessarily diminished the scope of executive power (which, at the time of the New Deal, was at its peak). So the major influences at the time went in opposite directions; the creation of independent regulatory commissions took away from executive power, while the Executive Branch was exercising a great deal more authority because of the national emergency of the Depression. Not surprisingly, the Brownwell Commission advised the Roosevelt Administration to convert the regulatory commissions to executive departments so there would be more presidential control over policy.

In this respect, independent agencies are distinguishable from executive departments in that they are designed to facilitate a policy process that is more non-partisan. In contrast, executive departments, like the EPA, are designed to implement the President's agenda pursuant to the statutory mandate set forth by Congress. But independent regulatory commissions operate somewhat differently. They have three essential functions: They have an adjudicatory role, a duty to implement statutory directives, and a rulemaking capability that works with both of those other functions. There can be various types of adjudications. The FCC, for example, may conduct the type of adjudication required to select a winner among competing applicants for permits or licenses, and it also has an adjudicatory function in determining if a licensee has violated Commission rules or statutory directives.

In order to perform their various functions, independent commissions were designed with the following characteristics: First and foremost is political independence. This essential quality of independent commissions is codified in a number of ways. (1) Independent commissions are bipartisan in their appointment process. Commissioners are appointed by the President, confirmed by the Senate, and are required by law to have just a narrow majority of the controlling party. At the FCC, for example, no more than three of the five commissioners can be of the dominant political party. The two remaining commissioners are required by law to be from the minority party (or no party, although I have yet to see

that happen). Additional indicia of the intended interest in the non-partisan nature of regulatory commissions are that Commissioners have fixed, staggered terms and generally can be removed only for cause, not because they disagree either with the White House or Congress. (2) The decisionmaking process of independent agencies is supposed to be collegial and consensual. In this sense, independent agencies have been compared to federal appellate courts. (3) The third defining characteristic of independent commissions is the reliance on applied expertise in the area of the agency's assigned jurisdiction. Independent commissions are designed to deal with problems that involve technical issues that Congress is not well equipped to handle, many of which require quick action.

Now, that's the theory. I have described the structure of the independent regulatory commissions and how they are supposed to function. Obviously, however, the FCC is not above the political fray. We do live in the world after all. And communications regulations certainly have been among the most hotly debated issues politically. But Congress was well aware of the political sensitivities when it established the FRC and the FCC. Indeed, a principal reason Congress established an independent commission to regulate communications in this country was because Hebert Hoover, the Secretary of Commerce at the time (who had jurisdiction over radio), had presidential aspirations. And so, Congress was not going to entrust control over this new and powerful medium in one very powerful politician who had an interest in higher office. For that reason, among others, the commission form of regulation was chosen. Substantively, such concerns are reflected in the political broadcasting rules. The rules require equal opportunities to use broadcast facilities when one candidate has been on the air, and impose other similar requirements. Such rules show a high degree of awareness by Congress that communications regulation needed to both be non-political and also to account for the possibility of political manipulation.

Since the Commission was created, and in its actual operation, there has been a continuing political tug-of-war between the office of the President and the legislative branch for power over communication policy. Presidents typically seek to expand executive influence by appointing strong chairmen who try to put their stamp on the agency and to move the focus of power at the agency in the direction of the executive. Congress, on the other hand,

tries to retain power through legislation and congressional oversight of the agency.

We have seen the appointment of strong FCC chairmen of all political stripes throughout the history of the agency. In 1980 President Reagan appointed Mark Fowler, a very deregulation-minded chairman, to be the head of the agency and the FCC moved in strongly deregulatory direction at that time. I should note that this was not an entirely new innovation. The Commission was already moving in a deregulatory direction under President Carter and his FCC Chairman Charles Ferris. But Mark Fowler's appointment accelerated that trend. In the mid-1990s, President Clinton appointed Reed Hundt, another strong chairman, but one who moved the agency back in more of a regulatory direction.

Congress, on the other hand, sees the FCC entirely as its own creature. Legendary House Speaker Sam Rayburn famously was supposed to have told President Kennedy's FCC Chairman Newton Minow: "Just remember one thing, son. Your agency is an arm of Congress. You belong to us. Remember that, and you'll get along all right." That sentiment sums up pretty well how the congressional oversight committees view the FCC. They see it as their personal property and will, in a variety of ways, exert their influence and control over the FCC.

On the panel just before this one, Andy Schwartzman was talking about independent regulatory commissions and said that, for all of its limitations, the independent commission model probably is the best structure that he can imagine. I think that remains to be seen. In theory, the structure of the independent regulatory commission is well-suited to the task at hand—to have an expert agency engage in collegial and non-partisan deliberations with statutory protections from political influences. However, there is an important question whether the theory can hold up against the experience of the real world.

This difference between theory and practice with respect to "independent" regulatory commissions is one of the more significant lessons to be learned from the FCC's media ownership proceeding. This proceeding tests the underlying assumption as to whether the independent regulatory commission, and specifically *this* independent regulatory commission, can perform the functions for which it was designed. A number of aspects of this proceeding illustrate how the independent commission structure has begun to fray. First, just to set the stage, the FCC did not decide on its own to start dismantling or to change its media ownership rules. That proceeding was required by the Telecommunications Act of 1996,

which directed the Commission to conduct biannual reviews and to eliminate those that were no longer necessary in the public interest, with a special focus on the ownership rules. The FCC had followed the prescribed process, and was reversed twice by the United States Court of Appeals for the D.C. Circuit, which ruled that the FCC had not justified its decision to retain certain broadcast ownership rules.

In response to those decisions the FCC embarked on a further rulemaking proceeding, and here is where things started to go tragically wrong. One of the decisions that Chairman Powell made was to conduct this rulemaking as an omnibus proceeding. That is, instead of having a separate proceeding on each of the respective ownership rules, he decided that it would be more rational to combine them, and to examine the common elements of the various ownership rules and to analyze them as a group. Now, purely as a matter of efficiency, that choice made a lot of sense. Chairman Powell is a very smart commissioner, a very smart lawyer. He had significant experience in this area, and it is hard to fault him on the logic of trying to analyze the media ownership issues in a single proceeding. His approach was consistent with the theory of the FCC as an expert body designed to address these issues collegially.

Unfortunately, in the real world, combining the media ownership issues into an omnibus proceeding also created a political backlash that resulted in a very contentious proceeding before the FCC. One of the ways this battle was fought was by Democratic commissioners, led by Commissioner Copps, who decided that it was necessary to host "field hearings" around the country and invite the public in to talk about its perceptions regarding the effects of media concentration. In one sense, it is hard to disagree with such an approach—if you are a member of Congress. This, after all, is the job that Congress is designed to do: To hear from constituents, to factor public sentiment into its decisions about legislation, to control what the FCC does, and to make decisions based on such political considerations.

On the other hand, for an expert agency that is trying to analyze the economics, the policy implications, and the First Amendment consequences of a change in media ownership policies, conducting a series of "focus groups" might not be the best way to get information on the issues. I testified at one of these hearings in February 2003, and was struck by the unreality of the situation. I arrived late because my plane was delayed, and as I came in to the hearing room, the audience was already there. As the proceedings were

beginning, I began to realize that the format might not be quite the right setting for the type of constitutional analysis that I had been asked to present. For example, I noticed as I made my way to the witness table that the entire front row of spectators was made up of people who were wearing television set face masks to exhibit their displeasure with the FCC proceeding. To me, this did not represent the kind of rational deliberation that an expert agency is designed for. So the field hearings were in reality a series of "pep rallies" around the country, designed for the specific purpose of marshalling political support for a given position. As a consequence, the process inside the agency became intensely partisan and directed at a particular result rather than providing a means to fully analyze the issues.

Another aspect of the anti-media concentration effort was the development of massive e-mail campaigns that produced tons of identical e-mails coming into the FCC. I read in one account that, in the last couple of weeks before the vote, 750,000 e-mails were delivered to the Commission. During the previous panel, Andy Schwartzman said that about two million emails were sent to the FCC during the entire course of the proceeding, and he suggested that this was a good thing. He said that this fact helped the court of appeals decide the direction that the FCC should go with respect to its ownership rules. Andy said that the e-mail campaign had a direct impact on the litigation in that the United States Court of Appeals with the Third Circuit was willing to grant a stay of the rules, in part because of the public reaction.

I look at these same facts and reach an opposite conclusion: The way the media ownership proceeding was conducted along with its outcome, and the impact of orchestrated spam campaigns on litigation, explains why it is getting very difficult for the FCC to function as an expert agency. The Commission is becoming a far more openly partisan body. Obviously, you cannot remove politics from the things we do on planet Earth. But the agency's *modus operandi* is becoming more expressly partisan—more like a political campaign than an exercise in administrative policymaking. This development has deeply divided the collegial decision-making process. There have been numerous reports from inside the Commission of how it is becoming more difficult for the Commissioners' offices to get along or really talk to each other. This has even affected staff communication. As I understand it, this has never happened before—and I speak as a former legal advisor.

Neutral adjudication is impossible where decisions are made by political referenda and by counting e-mails. As a matter of fact, if

all you are doing as a policy-maker is simply counting e-mails, you are no longer an expert agency. I'm sorry—you are an abacus; you are a voting booth—but you are not an expert agency. This point is even more clear to those who read any of those e-mails. Believe me, spend some time looking at those one-line complaints and statements of policy positions that flood the Commission. Everyone is entitled to their opinion; there is no question about that. But what role should such e-mail campaigns play in policymaking by an expert body?

What is the effect of these trends on the First Amendment and on the future of communications regulation? The FCC is the agency that regulates the institutional communications press. Consequently, it has a tremendous amount of power over the press. Unfortunately, as the non-expert process followed in the media concentration proceeding becomes a model for future agency action, the FCC is responding to pressure groups that want to regulate speech. In the indecency context, for example, the FCC is simply processing e-mails and assuming the tally is an indication of great public outrage, thus causing it to actively censor speech. The Commission explains that it must act in this area because it received a million complaints over the last year. However, a Freedom of Information Act request that I filed revealed that of those million indecency complaints in 2004, 99.9% of them came from one organization, the Parents Television Council. 99.86% of the complaints in 2003 came from that same organization. So it is hard to say that counting e-mails is particularly relevant to the work of an expert agency.

These same tactics are affecting the legislative process as well as the Commission's statutory responsibilities. For example, a bill was introduced recently that would extend indecency regulation to satellite and cable television. In this bill, one of the initial factual findings is that in 2004, Americans filed over one million complaints with the Federal Communications Commission about indecent programming. This number was presented as a "factual finding" of our Congress. Another provision in this bill says that after the FCC assesses a probable fine (called a Notice of Apparent Liability), there must be a public hearing before the Commission makes a final decision on the proposed forfeiture. Presumably, the purpose of such a hearing is to determine whether or not the penalty should be increased. In short, the method of decisionmaking pioneered in the media ownership proceedings, and that is antithetical to the structure of expert agencies, is now being imported

into other areas of communications law. The trend is not limited to questions involving policymaking, but is proposed for adjudication as well, in a way that directly implicates the censorship provisions of the Communications Act. For that reason, I think media ownership proceeding is a model for how the FCC *should not* operate, and why it represents the death of the Commission as an expert agency.

[Applause]

JAMES BOYD WHITE: Thank you very much. Our next speaker is Michael Good, who is currently Professor of Political Science at California State University East Bay where he's served as Dean of the College of Arts, Letters and Social Sciences until recently. He began his career as journalist and editor for the *Kettering-Oakwood Times* newspaper in Kettering, Ohio, and later served both as Professor and Chair of the Department of Political Science and Government at Ohio Wesleyan University. Professor Good.

MICHAEL E. GOOD: Thank you, Professor White. I'm a political theorist, and I think I'm the only political theorist here who is not also a lawyer, because I've heard a lot of political theory here. So I feel compelled and justified to escape from the immediately relevant, and talk about some more general topics. I want to talk about three myths, and I don't mean myths in the sense that they are true or false or some other fictional representation. Myths, in the sense I am using the term, are narratives that we've come to agree as an understanding for the past. In addition to understanding the past, myths also use the past to explain and to justify the present. Accordingly, the three myths that I will talk about are, I think, relevant to the discussion here today. The three myths are the common agreement and understanding, the explanation and the justification of their present are: Democracy; a free press or freedom of the press, and here I would include a more broad reference to freedom of expression in general; and finally Capitalism.

[Inaudible] There is a tradition that Leo Strauss, a political theorist, introduced to textbook reading students, a democratic tradition that started back with the Greeks and proceeded in a self-conscious way among the many western political theorists that have come to comprise the studied figures. This tradition is not history but an ideological framework into which some historical works are squeezed while others are ignored. But even though this tradition is an invention, it has an impact on the way we think about the political and ethical world. The Greeks contributed to the concept of democracy, and where we credit both Plato and Aristotle, principally, who argue that a just government is a citizen-centered one, in

which every human being is rational and capable of understanding his or her own interests sufficiently well to set goals and employ strategies to reach them. In Greek society human beings are seen as essentially developers of their unique talents, skills and potentials so to interfere in any way with their development is unjust.

Now, the framers of our Constitution, although they indeed used that mythical tradition as a way of explaining and justifying their commitment to democracy, did not give us that kind of a democracy. Rather, they gave us a Republic that was founded as a necessary evil, a limited government, a civil society that we are compelled to accept, because without government, the state of nature is a war of all against all, where life is solitary, poor, nasty, brutish and short—an ill condition not to be endured, to roughly quote Thomas Hobbes. It is, as the narrative offers, a government that governs best when it governs least. That is part of our myth, those two conflicting notions. The first is the myth that government focus is on the people. However, when the framers put the Constitution together the electorate was very different than the electorate is now. It was white men, and it would have been white men of property had they been able to agree on a definition of property so they could include a property qualification for the franchise. The framers had in mind a much more limited population that would be given the franchise, historically a literate and highly educated population. It included the economic and political elites of the several states. The Constitution and the accompanying debate promoting its ratification, were aimed at a narrow audience of state legislators and the economic and political elites who constituted the constitutional conventions in the thirteen states. Nine of those states had to vote for the Constitution in order that it be ratified.

The electorate today is a much wider, more diverse group of people, which constitutes a very different audience from those historical economic and political elites. Further, the myth, or narrative, holds that democracy requires a consensus on basic principles among the people. Research over the last fifty years that studied the commitment of the American public to democratic principles has shown us that there is little evidence that any such consensus exists except at the highest level of generalization. Several studies asked respondents if they agree with the principle of majority rule, minority rights, the freedom of expression, etcetera, and they, as you might predict, found a 95% consensus at that level of general inquiry. But a situation was offered that was a specific

case of each of those general beliefs—there was no consensus at all. Indeed, many disagreed with an essential ingredient of democracy when it was stated in specific tangible terms. Many of the researchers were persuaded that a consensus over basic principles is not necessary to have a democracy. The conclusion left unexamined is, “lacking a consensus on democratic principles makes it difficult to claim to be a democracy.”

For example, freedom of expression was largely engineered to guarantee *political* speech and expression. It referred to the debate that was going on between the federalists and the anti-federalists. In their minds was the tension between the people who wanted to retain the rights of the states to govern themselves and the necessity of the central government to exert control over the states in order to keep the necessary peace, order and stability. Their goal was to provide a perfect environment to promote the economic development of a nation that had, at that time, unlimited resources, unlimited potential. Moreover, limited government enabled elites to go forward with that development with little if any government regulations, therefore enabling them to accumulate all of the wealth they could. Free to try anything, in the context of unrestrained marketplace competition, elites could produce the best product most efficiently for the best price. Without government regulation the new nation would be unique in the world with a strong and stable economy and an important competitive advantage in the race for international prestige and power. So it was effective in that sense.

But in terms of freedom of expression, it was not a question of whether you would let a communist speak at the public school. Rather, it would ask you to listen to him and think about what he said and evaluate it in terms of self interest and the interests of the country. And those are the kinds of involvement in the marketplace of ideas that you need to have an effective democracy. People need to hear and to consider all matters of opinion. So the question is how much of this myth is just an idealization of the past, an idealization of history, and how much of it is an explanation and justification for the present that has little to do with history.

The second myth that I want to talk about is the myth of the free press. We talk a lot about diversity in the media. The question is not whether there is diversity or not, but what is the diversity about, how much diversity is there in the things that are really important. And so we talk about diversity in music, which fine, that's great. We've talked about diversity in drama. Look at television and see

where you find a diversity of anything that's really fundamentally important to the health of a democratic government.

The diversity of political opinion, represented in and by the media, is the diversity of opinions about trivial issues, and those issues are not issues that are likely to have any great impact on the distribution of economic and political power, both of which are largely ignored. So fundamental questions about the way in which power and wealth are distributed, and the consequences of the way in which we distribute resources, essential resources, in this country are never on the media's agenda because they are kept off the Government's agenda. Rather the media, together with the government and the corporations, eager to cooperate, have been able to define the contentious political issues and issues, the resolution of which really has very little effect, if any, on the economic and political interests of elites. For example how relevant are the issues of gay marriage or choices about medical procedures to the conduct of a democratic system? Curiously, those are two of the issues that were pivotal in the outcome of recent elections.

The second narrative fiction is that the competition guarantees objective, accurate and relevant reporting. The competition insures that a free press will have an adversarial relationship with the government, and therefore, hold the government accountable to the people. There is competition. We've talked about competition, but it is competition to deliver a certain content that has very little, if anything, to do with fundamental questions of democratic political values. The overwhelming objection on the part of many liberals—and I certainly consider myself one—of the concentration of media ownership in the hands of six corporations has been discussed here more than once. How is the domination of six media conglomerates different than competition among fifty? Well, six is different than fifty because six can fit in a Lexus. They can all go to lunch at the same time. They can all talk to each other and share ideas regarding interests common to all and still maintain competition in the area of circulation and its electronic surrogates. I'm suggesting there is a type of conspiracy. Six corporations have interests they hold common, just as the eighty had. But with six it is possible, and perhaps easy, to cooperate in the management of those common interests and at the same produce the illusion of competition, but criticizing one another once in a while.

Objectivity is a myth both in the content of media and in its guarantee by free competition. Having been a journalist, it is not how objective you are, it is what you're objective about. It is not

how the story is covered; it is what stories are covered, and the way in which they're covered. You know, the crime rate in this country has gone down every year for the last twenty years, but when you ask people they say it is gone up every year for the last twenty years. It is important to know that the crime rate has declined rather than increased because those perceptions have policy implications. The most recent example, of course, is that still after all of the discussion about it, nearly two-thirds of the people in the United States are convinced that Saddam Hussein was responsible for the events of 9/11 when even the administration has said, "Well, no, he really wasn't."

However, the media is keenly sensitive to certain political and economic issues. It is sensitive to markets based upon profits. It doesn't really play a role in informing citizens in a democracy to make rational decisions that are in their best interests. Rather, it informs them in such a way to make decisions that are consistent with the interests of corporate government and media elites. And it has been very consistent in doing that since its autonomy was guaranteed by the ratification of the Constitution.

One model of the media, suggested by Thomas Landon Thorson, holds that it is the DNA of political culture. The media passes on culture from generation to generation, and the accuracy of the DNA is responsible for the survival of the democratic culture. I would argue that if you use DNA as a model of the media, you would find that it has been very effective in passing along a kind of political culture that has allowed the development of business to continue at a wealth-producing rate, and even at an increasing rate, throughout the history of the republic.

The third myth is that capitalism—and this is part of the other two myths—is the best way of ensuring the most efficient, the best bargain and the best quality because of free, unregulated, unrestrained competition. The degree to which government refuses to regulate business, the better business is, the more efficient business is, so there should be no limits placed upon one's ability to acquire economic success through accumulated wealth. Those assumptions are inconsistent with the traditional historically based theory of democracy that holds rational individuals must not be deterred in the development of their individual skills, potentials and creative talents. It held that consumption was something that was instrumental in achieving that essential character of each human being. But under the current capitalist model, consumption itself is essential, and the development of talents, skills and creativity is merely instrumental in the production and consumption of wealth. In

other words, Capitalist Man develops his talents and skills and capacities because they allow him to accumulate wealth rather than the opposite.

The end to the Soviet Union, and the purported end to nominal Communist governments elsewhere, creates the unfounded conclusion that their transition to Capitalism is inevitable. But Capitalism is not, as the media would have you believe, the guy who sells noodles in front of his house in Ho Chi Minh City. He's not a Capitalist. He's a subsistence urbanite, who competes with everybody else on the street who sells noodles. But we look at that and conclude that the end of Communism is Capitalism. That's not capitalism. That's just a guy selling noodles.

Our fictional narrative now tells us that we need to get rid of regulation. But the regulations that help and that aid corporations and aid the media, are good things. The ways in which the government subsidizes private enterprise, as it did early in the 1800s when Congress appropriated thirty thousand dollars to develop the telegraph because Samuel Morse couldn't accumulate sufficient private funds to build a telegraph line between Washington and Baltimore, is not the focus of the deregulation debate. Congress subsidized a private company because it understood the importance of communication even though its development was not at the outset profitable. However, regulation as it protects the consumer, rather than reward the producer, is a widely recognized evil, recognized even by those who need protection the most and incentives to produce the least.

So it is important to see that these three myths are woven together in the contemporary cultural narrative even though current and specific fictional narratives about capitalism and democracy are incommensurate with one another. The more democracy you demand, the less capitalism you must accept. The more capitalism you desire the, the less democracy you will have.

The media is the DNA that preserves the myths, sustaining the myths of democracy, freedom of expression and Capitalism while at the same time, sustaining a status quo, replete with internal contradictions, so that traditional economic and political elites can continue their historical hegemony.

Thank you.

JAMES BOYD WHITE: Thank you very much. Our next speaker is Martin Redish, who's the Louis and Harriet Ancel Professor of Law and Public Policy at Northwestern. He's the author of *Federal Jurisdiction: Tensions in the Allocation of Judicial Power*, and of *The*

Constitution as Political Structure. His new book, *Money Talks: Speech, Economic Power and the Values of Democracy*, will be published by New York University Press next year.

MARTIN H. REDISH: Thanks, Jim. A point of personal privilege, the people who've set this Symposium up have done a magnificent job. [Applause] There's one minor exception. They've got a five-year-old bio for me. That book came out four years ago. I do, however, have another book coming out this summer with Stanford University Press called *The Logic of Persecution: Free Speech in the McCarthy Era*. I must say at the outset that I am still very upset by Professor White's suggestion that perhaps Voltaire never actually said that he would defend to the death my right to say something he disagreed with. I've made a lot of career decisions based on the assumption that he said that. It's a little late to turn back now. But I'll trudge on. I want to talk about the implications of all that we've been discussing and some broader aspects of it for the theory of the so-called fourth estate. The fourth estate theory is a special rationale for a unique position in the First Amendment framework of the institutional press. It originally goes back to a statement by Burke that there are three estates in parliament, but yonder there's a fourth estate in the gallery. But it's been at its greatest force in the United States where it's really become almost the fourth branch theory. And my thesis here is that ironically there are scholars who have simultaneously overstated the importance of the fourth estate theory and ignored some of its salutary purposes. To understand the fourth estate theory you have to put it in a broader framework of First Amendment theory, and beyond that, the broader theory of separation of powers. The fourth estate theory flows out of the kind of theory associated with Vince Blasi, who many years ago was on this faculty. His checking function, his pathological view of the First Amendment as he calls it. A kind of dark, negative view that suggests everybody has to watch his back, because there's somebody else putting a knife in it. And it reflects a mistrust for all branches of government, and sees the press, the institutional press, as performing this broad checking function. And in many ways it does grow out of the theory of separation of powers.

I think to explain the theory of separation of powers, I should give an example of a movie I saw when I was eleven years old. It was a grade B Zane Grey western titled *The Robber's Roost*. It was about a group of outlaws harassing an elderly rancher and his daughter, and I don't mean just calling them up in the middle of the night asking them if their refrigerator is running kind of harassment. I

mean serious cattle rustling, and he was basically defenseless. And the rancher went to town and he hired another group of equally disgusting outlaws to check the first group. Now, he didn't trust the second group either, but he knew that the first group of outlaws would check the second group. And I stood up and yelled, "This is separation of powers!" I was an extremely nerdy eleven-year old, I should add. But this is the theory of the fourth estate that somehow the institutional press will balance out government. Jean Shepherd, the comedian, wrote a book many years ago entitled *In God We Trust: All Others Pay Cash*, and that really flows out of the Federalist Papers where they said, "If angels were to govern men we wouldn't need separation of powers. But everyone is flawed." So there is this dark, cynical skepticism that rationalizes the fourth estate theory. The problem with the theory is that the only one exempted from this kind of assumption of skepticism and cynicism is usually the institutional press. And I think the way to understand it is to contrast it with the views of some scholars, particularly Professor Baker. Professor Baker and I are friendly enemies from many, many years ago. We are the First Amendment equivalent of the Road Runner and Wile E. Coyote. I'm not sure which of us is which. We've been doing it for enough years that now we walk after each other instead of chase. But Professor Baker has long argued that non-media corporations should have no First Amendment rights. And the rationale that he gives, and I won't limit it to him—there are others who've given additional rationales—they're both Kantian and utilitarian, or instrumental. From a Kantian perspective, the argument is a corporation is a mindless, robotic, driven, profit maximizer. It has no choice in what it says. Of course, this ignores the choice of the individuals to use the corporate form to self realize in the first place. But that's the assumption.

From an instrumental perspective it is assumed that corporate centers of power, non-media corporate centers of power, if allowed unlimited protection to speak, will dominate the market, will drown out competing views, will give rise to a misimpression about the strength of the position they're advocating, because of the money behind it. This is basically what the majority said in *Austin v. Michigan Chamber of Commerce* in I think 1990, give or take a year or two. Okay. Well, let's accept that for purposes of argument and apply that kind of thinking to the media corporations. Media corporations are profit driven. Most of them are publicly held. I'm not talking just about the concentration problem here, not just the big six in the Lexus. I'm talking about pretty much any kind of

media endeavor is a corporation. It maximizes profits. I know I live in Chicago and the Tribune Corporation owns the Cubs, and there are people who call up the sports stations and say, "Why don't they spend money on better players?" And I call up the sports stations and say, "Because it would be *ultra vires* to do that if they are going to have as many fans anyway, and because of the bars on Clark Street they are going to have as many fans. So they're not allowed to spend more money. They have to be profit driven." And that is also true of media corporations. Professor Baker in one of his books said, "But they're not particularly talking about a product." Well, if we leave out the issue of commercial speech and just talk about non-commercial or political commentary by non-media corporations it's not entirely clear what they're going to say. It will be, to be sure, profit maximizing, or else they're abusing their shareholders. But the same is true of the media corporations. The institutional press is a strategic actor. It is a profit maximizer, and not inconsistently, it is often an ideologically driven actor. And we can see that just right from the beginning of the nation, and we know about the Alien and Sedition Acts—or many of us know—that Jefferson, when he got into power, used state governments to suppress the federalist press. Well, if you ever go back and look at what the federalist press and the republican press were doing, you could understand why both of them would want to shut them the heck up. They were nasty. They were strident. They were offensive, not to suggest, by the way, that there is constitutional authority to do so. But I can understand the desire, because the press has been an ideological actor.

Think of the Sinclair situation during the campaign. How does this affect news coverage? Well, it can obviously affect editorial policy—policy of columnists. It can affect news coverage both in what is covered and in the slant of what is covered. There are many studies by political scientists that show that the first Gulf War, the antiwar movement, which apparently was in existence, was never covered by the institutional media, just completely excluded. In terms of news slanting, this book I'm just publishing about the McCarthy era—I'm going to give it another plug—if you go back to the way McCarthy manipulated the press—and the press used McCarthy—one can see a really ominous control of news coverage based on the ideology of the press.

So this fourth estate function that we are assuming the press is performing, and oftentimes does perform effectively, of checking the government is not always performed. Think of the bullfighter's *olé* that the media did for the assertions of weapons of mass

destruction. It had to be due to ideologically driven considerations, total incompetence, or total laziness. There is no other explanation. More likely the first I would think. The goal then, recognizing that the institutional media is such a profit and ideologically driven actor is not to suggest their First Amendment rights should be reduced as a result. I have long maintained that the First Amendment is not the preserve of Mother Teresa. Everyone tries to maximize his or her own interests, and that's the way it is. But the goal should be to broaden the recognition of potential speakers. Private corporations, non-media corporations, are not saints. They are driven much as the institutional media is driven by their narrow interests.

But remember the theory of separation of powers, what public choice theorists referred to as pluralist theory. You don't trust anyone. When you don't trust anyone, you want as many actors as you possibly can have. Recognizing full First Amendment rights for non-media corporate speakers, both in terms of what's defined as commercial speech and for their rights to contribute to political campaigns, should be recognized as a means of counter-balancing the numerous times that the institutional media may well be in bed with the government. Now, I certainly don't mean to suggest that the problem about the Gulf War news coverage is going to be resolved by giving Phillip Morris full First Amendment rights, but the fact that we now have it documented that it happened in the Gulf War situation should make us very concerned that it's happened in numerous other situations, and government is often trying to regulate products and services, and the press is not always adequately explaining competing positions. To recognize the full First Amendment rights of non-media corporations will add to that balance.

Think of the *Nike* case. There have been a lot of assumptions—very broadly painted assumptions—that the corporate world is in control of the government, and the corporate world is some monolith. It's not really a monolith. In the case of Nike, where challenges were made to whether Nike was running virtual slave sweatshops in Third World countries, much of the media that discussed it, from Bob Herbert of the New York Times to some of the California columnists, were extremely negative to Nike. Nike holds a press conference to say, "No we don't. We don't have sweatshops." I don't know whether they do or not. That's really not the point at the moment. But California had this weird law—I gather they've changed it—where anybody could sue about anything. So

somebody named Kasty brought a lawsuit accusing Nike of false advertising. And the issue was, had Nike engaged in commercial speech? And under current Supreme Court doctrine, which treats commercial speech as something of a stepchild, false commercial speech is automatically excluded. Political speech that is false, on the other hand, is likely to get the protection of the *New York Times v. Sullivan* malice doctrine. The issue was whether Nike's statements were fully protected political speech or were they commercial speech. The California Supreme Court split 5-4, holding it was commercial speech and therefore, giving it reduced protection. The Supreme Court granted cert. There were over twenty-five amicus briefs filed, including one by me. And think of the man hours that went into those briefs. Then the Supreme Court says, "Whoops, on second thought, cert was improvidently granted." And you couldn't have told us that before? But as a result, Nike is basically in a debate with columnists like Bob Herbert, who said, with one hand tied behind its back, Bob Herbert can say anything about Nike and be protected by the actual malice standard. Nike responds, it's advertising its product. There is a broad base of opinion that can come from other centers of power. Now, what else can we do as a matter of First Amendment law to try to take into account the fact that the institutional press is often a strategic actor and often in bed with the government?

Well, the first thing to emphasize is one thing we should *not* do. That is to recognize rights of access or government's ability to create rights of access to the institutional media, or the ability of government to, except in limited circumstances that I'll explain in a minute, control ownership. The irony I find in Professor Baker's position is that on the one hand he's willing to extend full First Amendment protection to these media corporations while he's not to any other corporations. Yet he seems, in his statement today, to recognize the very dangers I've pointed to and suggests government should be able to manipulate what it is we hear and see by regulating ownership. Well, did you ever hear of the saying, "I'm from the government and I'm here to help you?" That's the kind of concern we have to avoid. As my question this morning indicated, I'm not happy with the current situation. I consider the cure of government involvement to be worse than the disease.

Now, I should close with a kind of point of personal privilege, a statement about the political implications of all this. If there's one thing my constitutional law students are supposed to get out of the class—and often it is all they get out of it—it is that they cannot view the Constitution as coterminous with their own narrow politi-

cal views. And to give you an illustration, I'll tell you a story about a phone call I got last fall from an applicant to Northwestern Law School. I have never, ever gotten a phone call from an applicant. And this fellow says to me, "Professor Redish, I have worked for four years as a consultant to the Republican National Committee, and I just so adore your work on the constitutionality of campaign finance regulation. You and I have really identical views, and I would love to be able to come to Northwestern to work with you." And I said, "Actually, I worked on the Kerry campaign." And there was this dead awkward silence for about ten seconds and then I figured I'd better break it up. And I said, "But there are many on my faculty you'll feel comfortable with." And then I immediately called the Dean of Admissions and told him to reject this fellow. [Laughter]

People somehow get the assumption that I am some kind of crazy right-winger, and sometimes the people who think this like it, and it gives me some very, very strange bedfellows. That isn't my politics. But there are a lot of things politically that I don't like. That doesn't mean I can use the Constitution as a means for implementing my political agenda. What I also tell my constitutional law students is, "You have to view normative issues in constitutional law on two levels. Level two I call your narrow political predilections." And these are very important issues when we're in a legislature, when we're in a political campaign. They should not drive constitutional analysis. This is not to say there are no normative issues in constitutional law. But they are what I call level one constitutional issues. They are debates about how best to implement the process values that adhere in the Constitution. The fact that I may agree or may disagree with a particular speaker is beside the point, because as Voltaire once said—well, you know the rest. Thank you very much.

JAMES BOYD WHITE: Thank you, Marty, and thanks all of you. You in the audience have no reason to know this, but these four speakers exhibited a phenomenal self-control: everyone stopped speaking just at the moment that the green stop sign was held up.

MARTIN H. REDISH: That's because you physically threatened us.

JAMES BOYD WHITE: That's true. It's an incentive system. Questions?

AUDIENCE MEMBER: I'd just like to thank the panel and all the organizers. I think this has really been a great, great conference. One of the themes, Professor Redish, that you raised is this

notion that corporations and media corporations do not constitute a monolith. And I guess in response to Professor Good's comment that they can all fit in a Lexus. The simple fact is anybody who has a TIAA-CREF account or a Vanguard account, or a Fidelity account owns shares in those six corporations, and we all can't fit in a Lexus. And I guess one of the things that it gets me to thinking about is that government isn't a monolith either, and that picking up perhaps on Mr. Corn-Revere's comments about the FCC as an independent agency versus an executive agency versus legislative, I wonder whether you would comment on how bad really is it to think about government regulation when we might think about different institutional arrangements for that kind of government regulation? And again, you don't have to accept everything that Bob is saying about the FCC, but might there not be a way in which—that might regulation of the media through structural means, I think as Professor Baker would argue, might be part and parcel of the way in which we think about government not being a monolith, and therefore not being necessarily a bad thing in the grand scheme of ordering our communications policy for First Amendment purposes.

MARTIN H. REDISH: Well, first I think I need to say that now the government almost is a monolith. I didn't think this is what the Constitution had in mind when it assured us a republican form of government. So, I love Professor Baker dearly, and I have great respect for his work. I find his underlying assumptions to be fundamentally flawed at the core, so anything that grows out of it is fruit of the poisonous tree. The idea that the government gets to decide that people need to hear certain things that maybe they're not hearing now I find very troubling. The government has its own ability to contribute to public debate. But for the government to in any way try to manipulate the flow of debate, particularly private debate, by taking away authority from one speaker and transferring it to another I consider very ominous.

ROBERT CORN-REVERE: I'd like to make a couple of points about monoliths, too. First, I should say that I forgot to give my usual disclaimer when I speak at events like this, and that is I am representing only my own views, not those of any client. Usually I say that just so clients don't get blamed for the things that I say. I also say it because some of the clients that I represent are among those people who are nefariously named as creating the "problem." I want to make clear that I am not taking any positions here because of who my clients are. As Andy Schwartzman can tell you, I had these views long before I represented anybody.

I do want to respond to Michael Good's point that media objectivity is a myth because the heads of the six largest media companies can fit into a Lexus together. Whichever six corporate heads you want to put on that list, you should be aware that most of these people wouldn't get into a limo together let alone a Lexus. All you have to do is watch the delight that they take when they can report on each other's gaffes. Historically, you can look at the one network news report that had truck explosions that were "helped along" in their re-enactments, or you can point to other, more recent examples as well. Networks just love to report on their competitors' mistakes. Just because they are big companies does not mean they are a monolith.

As you listen to the various speakers here it is a useful rule of thumb to count the number of times the word "conglomerate" is used. Doing so provides a good index of how accepting each speaker may be to more governmental regulation over communications. Speaking in terms of monoliths, I think the government is more monolithic than it has been in the past. I agree with Professor Redish that the exercise of that governmental power is extraordinarily dangerous, even when it's described as being "neutral." Structural regulations usually are contrasted with content controls, and therefore are presumed to be more benign. But governmental power is exercised in a way that is not speaker or viewpoint or content neutral in many cases. For example, thirteen or fourteen years ago, the Senate in the dark of night put a rider on an appropriations bill that nobody knew about, including the President who signed it, that prohibited the FCC from granting waivers from the cross ownership rules. This rider was directly targeted to Rupert Murdoch because of his editorial policies. You may think whatever you will of Mr. Murdoch, but when Congress passes legislation because some members don't like the views of one individual, then we are in a very dangerous territory, from a constitutional standpoint. If you check the Congressional record from this instance you will find outrageous statements on the floor of Congress calling Murdoch a "scumbag" and any number of other things. Such pejorative views motivated this "structural" regulation. Having worked at the FCC I can tell you there is a real danger in this kind of thing. Such problems abound as you start talking about using regulations to control "monoliths."

AUDIENCE MEMBER: I think in the same way that news is about what you choose to report or not report, as well as the slant that you put on it. Government regulation is the same thing. I

don't know how we can say that government's not engaged in this practice. And as I hear all of this discussion today, I've heard a couple of speakers now and in the earlier session really abdicate for the idea that the more owners we have or the less concentration of ownership we have the better. But I haven't really heard anybody argue that concentration of ownership is actually beneficial for democracy. I hear that still. The closest people get to that is I think neutral if I'm hearing it correctly. And so I guess I'd ask you if that's a correct interpretation of what I'm hearing? Does anybody actually think that concentrating ownership of media is good? And do some people think that dispersion is good. And who thinks it should be somewhere in the middle I guess?

C. EDWIN BAKER: There's actually arguments that concentration would be beneficial. Usually the people that make these arguments don't really focus on democracy so much as on people's interests or preferences. The claim they typically make is that concentrated ownership can lead to efficiencies that will lead to more and better media products. And so the public would benefit by concentrated ownership that produces these products. I've just responded to a person who's written an article about what he calls architectural censorship. He claims that almost all of the FCC rules regulating ownership should be viewed as unconstitutional. He thinks they're unconstitutional for the instrumentalist reason that the regulations reduce the quality and quantity of the media products that people receive. Though he's economically trained, I find his argument very uninformed economically. I also reject his political conceptions. But such arguments as his are made and are influential. Some were made in the context of FCC proceedings on ownership regulation. So it's not an argument that doesn't exist. Now, whether the argument is any good is a different matter.

I could also talk forever in response to Marty. Let me just make a couple of nitpicky points. In the *Nike* case the general assumption was that if Nike's speech was political, not commercial, that Nike would get very, very strong First Amendment protection. Actually when corporate speech is purely, undoubtedly political, at least under normal classifications, for example when it is related to a political campaign in the *Austin* or the *McConnell* case, the Court said that the government could completely prohibit it. The corporate political speech was given arguably less protection than commercial speech receives. So I doubt the importance of this categorization, of whether it's about a product or about politics. Rather, the important matter seems to be who the speaker is. Indi-

viduals may have a status much different than the typical corporation.

But then Marty's question rightfully is: Why or how are media corporations different from other corporations? It seems to me that we must answer that question. I do think it's a troublesome question. Most of our criticisms of the media is precisely that it's too much like other corporations. All they want to do is make money, and it'll give us horrible content in doing so. But we can still conclude that the media merits constitutional protection, because it's absolutely essential for a democratic process. It differs because the Constitution has a press clause, not a corporation clause. But after saying it merits protection, we still must figure out what meriting protection means. And it may very well be that various types of structural interventions in the media realm designed to make it better serve its democratic or societal function aren't prohibited by the First Amendment the way censorship is prohibited—censorship of the speech content of any individual or media corporation.

That's certainly been the view of the government since the founding. In the original debates about the Post Office the question was which types of papers should we promote and how should we promote them? And they adopted structural subsidy policies reflecting those debates. Throughout our history we've been subsidizing and regulating the media. Oftentimes the regulation reflected a model that was described this morning as the broadcast model. Distinguishing that from the press model is, I think, a wild overstatement. In the *Red Lion* case, for example, the authority most crucial to the result, and continually relied upon by the Court, was a press media case, *Associated Press v. United States*. That is, there may be lots of structural regulations that should be permitted in respect to any media.

JAMES BOYD WHITE: I think we have time for one more question. Is there one over on this side? Thank you.

AUDIENCE MEMBER: Yes, and I'd like to thank Mr. Baker for answering the question—the second one that I wanted to ask, in general, about how the government's currently subsidizing large media. So to go to one more specific question to Mr. Corn-Revere. You said that the question was what role should the public opinion play in affecting decisions of an independent regulatory commission. And what I'd like to know is if there is a role that the public can play or should play in how that commission does its job or how that commission's job is defined. What channel should the public

be using for that? I agree that media campaigns directly to them negatively affect their ability to function as an expert committee. And I think that's an important point. But what I'd like to know is what channels should we be using to allow it to stay an independent expert committee and yet still allow an active citizenry as part of the process?

ROBERT CORN-REVERE: That is a very good question. I think there definitely is a role for public input, and I think the proper role involves working through Congress and contacting congressional leaders. After all, Congress writes the organic statute that gives the independent commission its mission. Through the electoral process people make their views known to elected representatives, and those views filter down to the commission through legislation. And by the way, if you've been reading the papers about the FCC lately, people aren't shy about contacting Congress about what they want the FCC to do. If some measure is adopted as legislation—particularly if it affects either media ownership or content—then the FCC will be bound to implement that statutory command. An important question then may arise about whether the new restriction is constitutional, since you're talking about regulating media companies. Depending on your outlook you may reach different conclusions in response to that question.

It may be helpful to compare current questions about "structural" media regulations to postal subsidies during the earlier part of the 20th Century. Using postal subsidies as a way to regulate the content of what goes through the mail is well understood now to be plainly unconstitutional, while, back in the '40s and '50s, that conclusion was not so obvious. Many communication regulations that were considered acceptable at one time in our history under then existing First Amendment jurisprudence may no longer be considered constitutional. Much of what was taken for granted as permissible government activity when the Communications Act was written includes the kinds of regulations that courts no longer accept.

In the intervening years we have had more case law development and more situations where courts have addressed whether or not the regulation at issue is a proper function of government. For example, in Professor Baker's description of what the proper role of communications structural regulation should be, he wants us to get away from the notion of "commodification"—and that giving people more of what they want is not an adequate goal under the First Amendment. Instead, public policy should be directed toward giving them more of what they need. I suppose this is a question

worth asking. Many people might wonder why we have this short little attention span in this country, and why people don't pay attention to political dialogue. It is an easy thing to blame the media for this phenomenon. But I think if you substituted the term "political campaign" for "media" in that statement, you probably find as good an explanation for the problem. But to me it is a bit like trying to blame McDonald's for the fact that you are getting fat. Getting back to the theme of my presentation, I agree with Professor Redish that the cure can be worse than the disease. Am I the only one in this room that finds it kind of frightening that we should look to the FCC to determine what we "need" through the media? That to me is a much more dangerous prospect than anything that media concentration may cause. Since this answer is in response to the final question for this panel, there is not enough time to explore the issue, but who today has access to less information than they had ten years ago?

C. EDWIN BAKER: I never said that the government should give us what we need rather than what we want. What I said was that what people want is something other than just commodities. Commodities are one of the things people want but there was also evidence that they want limited ownership. And they have good reasons for that desire, that judgment. But I didn't say that democratic governments should give them what they don't want.

PANEL III
MEDIA AT THE MARGINS

LIZ WEI: Welcome back everyone. We've heard a lot of discussion in the earlier panels about the need for diversity, and Professor Good asked in the second panel what kind of diversity. So we hope this last final panel today will expand upon that question. And Ryan and I both felt very strongly about the need for this panel to ensure that the concerns of women and racial minorities and other historically marginalized groups would be both discussed and solutions, perhaps, would be suggested. Alicia Davis Evans will be moderating this panel. She is an Assistant Professor at the Michigan Law School faculty here. She started in the Fall of 2004, and she teaches Enterprise Organizations and Mergers and Acquisitions. Her current research includes projects in the securities regulation area. Before joining the faculty she practiced law at Kirkland & Ellis in Washington, D.C., where she represented public and private companies and private equity firms and mergers and acquisitions and leveraged buyout transactions. Her experience also includes five years as an investment banker, first with Goldman Sachs & Company in New York, and then with Raymond James & Associates in St. Petersburg, Florida, where she most recently served as Vice President. Evans is a member of the bars of Florida and the District of Columbia, and Professor Evans earned her B.S. in Business Administration from Florida A&M University, her MBA from Harvard Business School, and her J.D. from Yale Law School. If you could help us welcome her.

ALICIA DAVIS EVANS: Good afternoon. It is my distinct pleasure to welcome you to panel number three, entitled *MEDIA AT THE MARGINS*. As Liz mentioned, we've spent the last couple of days talking about the effects of concentrated media ownership, and our current panelists are going to speak to us about the effects of media consolidation on women, people of color and other marginalized groups. As was the case with our first two panels, each speaker will speak for approximately twenty minutes, followed by a question and answer session. And again, please as a reminder, if you have a question, please raise your hand and I will recognize you, but please wait for a microphone before you begin to ask your question since we are transcribing the proceedings today. Dr. Susan Douglas will serve as the first speaker on our panel. Dr. Susan Douglas is the Catherine Neafie Kellogg Professor of Communication Studies at the University of Michigan and serves as the Chair of her department. Dr. Douglas is also the author of a number of

books, including *The Mommy Myth: The Idealization of Motherhood and How it has Undermined Women*, which she co-authored with Meredith Michaels, *Listening In: Radio and the American Imagination*, which won the Hacker Prize in 2000 for best popular book about technology and culture, *Where the Girls Are: Growing up Female with the Mass Media*, which was chosen as one of the top ten books of 1994 by National Public Radio, *Entertainment Weekly* and The McLaughlin Group. Dr. Douglas has lectured at colleges and universities all over the country. She's a frequent media commentator and has written for a number of leading publications. Dr. Douglas's column, *Back Talk*, appears monthly in the publication *In These Times*. Please join me in welcoming Dr. Douglas, who will speak to us on the topic "Women and Minorities in the Age of Consolidation."

SUSAN DOUGLAS: Well, thank you. I am not a lawyer, I'm not a policy scholar, I'm not even an economist. And so talk about being a hen in the fox's lair. I'm a media historian and I'm really speaking today primarily as an audience member who was not getting what she wants from radio, from the broadcast news, from public affairs programming, and I'm also speaking as a feminist and anti-racist scholar. What I want to do today is talk about actually the interrelationship between two crucial regulatory moves: the deregulation of ownership limits that began in the 1980s as we've heard throughout the day under Reagan and Mark Fowler, and culminated with the 1996 Telecom Act, and the relationship between that and the abandonment of the fairness doctrine in 1987. Of course, we know that the deregulation of ownership restrictions were what allowed for increased consolidation. But it was the elimination of the fairness doctrine that helped expand an ideological field that would in fact justify deregulation—excuse me—that would demonize government oversight of—well, pretty much everything—including and especially the broadcasting industry that would celebrate the market as if it was Buddha as the best and only way to give the people what they want, and thus to either state or imply that the voices of women, except for the right wing blondes, and people of color, also except for right-wingers or those on the payroll of the federal government, were marginal and irrelevant. The elimination of the fairness doctrine was absolutely central to media consolidation in the 1990s and beyond, and to the slowing or thwarting of any progress women and minorities might have made in the post network deregulatory era.

Now, I do agree with my colleague, Russ Neuman, who spoke this morning, that we should not idealize the past or impose a false

nostalgia on the broadcast system of yore. After all, just to give a few examples, it was CBS that censored the Smothers Brothers and threw them off the air. It was CBS that refused to promote the Edward R. Murrow broadcast that took on Joe McCarthy, so Murrow and Fred Friendly had to take those ads out in the *New York Times* by themselves. It was TV in the 1950s and '60s that kept Black actors off of TV so their southern affiliates would not be alienated. And it was TV that gave us *Mr. Ed* and *My Favorite Martian* as quality programming. However, I would argue that regulation has mattered in the past, and it has had, however briefly, a salutary affect on diversity. And I'll just give two examples: the FCC in the wake of the 1941 report on chain broadcasting reduced the required bandwidth distance between AM stations in 1946, and thus allowed more stations to inhabit adjacent frequencies. Now, what that meant is that between 1946 and 1951 the number of small stations, and these were tiny, they were between 200 and 1,000 watts, increased by 500 percent. And much of the music, public affairs and talk on these stations reflected more local grass roots interests. Some of them began catering to the Black audience, which was actually central to the civil rights movement in the 1950s. Now, a lot of these stations did not cater to the Black audience because they were altruistic. The Black audience got discovered as a market in the early 1950s. However, some of these stations were very much motivated by the move towards civil rights, and we began to hear in a range of small stations across the country, and even 50,000 watt stations, Black programming, Black music, Black activism. So this regulatory move made a difference. Another example of regulation that promoted diversity was the 1964 non-duplication ruling. For a very brief history lesson here, FM was developed and demonstrated in 1935, but for a variety of reasons it was not developed by RCA, because David Sarnoff wanted to develop television instead of FM. FM kind of languished until the 1960s. Many stations did have AM and FM broadcast capabilities, and many of them were broadcasting the exact same thing on their FM outlets as they were on their AM outlets. And so what the non-duplication ruling did is it mandated that in cities of more than 100,000 people, radio stations that had AM and FM could not duplicate more than fifty percent of their programming on both stations simultaneously. Now, it's true, this only affected 337 of the country's commercial FM stations, but it did promote more enterprising exploitation of FM, and between 1964 and 1967, 500 new commercial FM stations and sixty educational stations went on the air. The FM explosion of the late '60s and early '70s led to enormous musical, political and cultural di-

versity on the air until FM, of course, was discovered by the commercial interests and then went down the sorry slope of commercialization. So I would argue that regulatory changes do matter. We have historical examples when they have promoted diversity.

So first I just want to give a brief overview of where women and minorities stand today vis-à-vis media ownership, and then return to the demise of the fairness doctrine, and why I believe it should be restored. Let's be clear, women and minorities have never had an equal place at the table of media ownership or control, not under the old network oligopoly structure, nor under the more recent structure that combines the proliferation of media outlets with niche marketing and consolidation of ownership. But having said that, under the older public trust model, which we're going to hear about in a minute, and when the news divisions of the networks were still financially supported, in part by the entertainment divisions of the networks, and therefore not so tied to producing ratings and audiences, the civil rights movement and the women's movement did get considerable coverage on the network news. There were a variety of reasons for this, including the drama of the images, the newness of TV news, the power of these social movements. But I just want to emphasize here that there were some golden moments that we can look back to with nostalgia, and one of them is the news media's coverage of the civil rights movement despite its warts and all. And that coverage was crucial to changing public opinion in the United States about race relations and race equity. Most Americans first learned that there was a women's movement from the mainstream media, including broadcast media. And I've done a lot of research on this—and take my word for it, a lot of this coverage was condescending and marginalizing and patronizing. However, it also provided feminists with a national podium to press for equal pay for equal work, and to emphasize that the political is personal. Public opinion showed that by the mid and late 1970s most Americans had had their views about gender equity transformed, in part because of such media exposure. So I don't want to idealize a past that was not ideal, and that was characterized by oligopoly control, but I would argue that things are worse now, and they are worse, in part, precisely because the proliferation of media outlets has not led to more diversity as promised by the media conglomerates. So it's not that the past was great and filled with diversity. It's that the promise of the new technologies, and more outlets, and the possibility for more

diversity has been thwarted, that the promise of the marketplace of ideas has been trumped by the marketplace of dollars. The proliferation of outlets exploded at exactly the same time that deregulation took place, and when all of these—a variety of these outlets, and especially but not exclusively radio stations, got priced out of a lot of people's price range and just got bought up by the conglomerates.

Minority ownership is defined as any media outlet in which minorities own more than 50% of the firm's stock or equity interest and/or actually control the outlet. Now, according to a 2001 report by the NTIA, the National Telecommunications and Information Administration, minorities owned 3.8% of radio and TV stations in the U.S. and that broke down to owning 4% of commercial radio stations and 1.9% of commercial TV stations. These figures are actually more discouraging than they appear, because over half of the 426 minority owned radio stations are AM, which are today lower power and generate less add revenue than their FM counterparts. The merger mania of the '80s and beyond drove the prices of FM stations so high they were not affordable to small female or minority owned businesses. Only one cable network, Univision, is classified as minority owned, although 25% is owned by a Venezuelan owned company, and 25% by the Mexican entertainment conglomerate Televisa. In 2002, as we all know, Telemundo was purchased by GE/NBC. There was one Black owned national cable channel, BET, but that was bought by Viacom in 2002, and one of the first things they did was cancel a variety of the news shows, including BET Tonight. And even at AOL Time Warner we can point to the CEO, Richard Parsons, who's African American, but that would hardly classify AOL Time Warner as minority owned. None of the top twenty websites are minority owned. In Hollywood, according to a 1996 study, 85% of the writers, 93% of the directors, and 84% of the producers were men. The Screen Actors Guild reported in 2002 that only 22.1% of all roles in 2001 went to performers of color, which was down from 2000, where the figure was 22.9%.

Now, compared to the population as a whole in 2001, in which minorities accounted for nearly 1/3 of the total U.S. population, and women make up anywhere from 51–53% of the population, we see that there's just a slight discrepancy here. Maureen Dowd is the only female among the *New York Times* stable of nine columnists, and hardly a feminist I might note, as she's often taken staunchly antifeminist positions. In 2002, 80% of all *New Yorker* articles were written by men, and when we get women there we get somebody

like Caitlin Flanagan, who celebrates shopping for strollers and trashes feminism whenever she can. Media content about women and people of color then is filtered through a few corporate giants that care, of course, about maximizing profits and not about equal representation of civil rights. But it's also filtered through a lens that is increasingly conservative, anti feminist, or anti affirmative action or all of the above and then some.

So what I want to raise as part of today's discussion about media consolidation that is crucial to its success and that supports the trend of marginalizing the voices of women and people of color, especially in news and public affairs programs, is the demise of the fairness doctrine. This basic principle that broadcasters had the obligation to address all sides of a public controversy during the course of their broadcasting was implied in the Telecommunications Act of 1934, initiated in 1949, and made explicit in the *Red Lion* case, as we've heard earlier today, in 1969. In practice the doctrine was meant to do two things, require stations to cover controversial issues of public importance and provide differing points of view about such issues. What the fairness doctrine sought to prevent was stations broadcasting from a single perspective day after day without opposing views. Early in his tenure Ronald Reagan's FCC chair, Mark Fowler, who famously noted that the television is just like any other appliance, it's like a toaster with pictures, announced his opposition to the fairness doctrine, and that the FCC had to get out of the content regulation business. The argument was that the old fairness doctrine was based on the notion of scarcity, that there was a scarcity of spectrum and a scarcity of outlets, and therefore you had to ensure diversity of opinions. But once there was a proliferation of cable and other media outlets the scarcity argument no longer applied. In 1984, the Supreme Court ruled in *FCC v. League of Women Voters* that the scarcity rationale underlying the fairness doctrine was flawed, and that the doctrine was limiting the breadth of public debate. And this is certainly one of the charges that many broadcasters made. In August of '87 the FCC simply announced that it would no longer enforce the fairness doctrine. Congress responded in September by passing a bill that would have reinstated the doctrine. It passed the House by a margin of 3 to 1, and it passed the Senate by a margin of 2 to 1. Reagan vetoed it. There has been no fairness doctrine since. Congressional efforts resumed again in '91 to reinstate the doctrine, but President Bush won, threatened to veto it, and that effort lost steam.

Critics have argued that the fairness doctrine was confusing to stations and citizens alike, it was expensive and time consuming to enforce. But its demise has led to a major rightward sway in public affairs and news programming and the marginalizing of women's and minority's voices in the media. There has been a decrease in the coverage of a variety of issues, but this is especially true for local news and local public affairs programming. It is especially those areas that have suffered. A study by the Benton Foundation found that 25% of broadcast stations no longer offer any local news or public affairs programming. The biggest casualty in terms of diversity has been news and public affairs programming on TV and in talk radio, and then of course, in music on the radio. And again, to take on my esteemed colleague, Professor Neuman, one station changing its play list does not counteract Clear Channel owning anywhere now between 1200 and 1400 radio stations, many of which broadcasts the same six songs. There is, I would argue, more diversity in entertainment programming on television than there was in the oligopoly days. Just look at what's on cable channels. There's much more diversity in entertainment programming, although their representations of people of color remains abysmal. It's TV news at the local and national level that are nothing short of a disaster area, and I think that's really what so many of us are really deeply concerned about.

In the wake of the demise of the fairness doctrine, one of the biggest consequences, of course, has been the onslaught of conservative opinion, especially but hardly exclusively on the radio, that remains unanswered, it remains unchallenged, where Rush Limbaugh routinely rails against what he calls feminazis, and where Pat Robertson can claim, and I quote, "That feminism encourages women to leave their husbands, kill their children, and practice witchcraft." This is worse than the 1960s and 1970s. Right wing evangelical broadcasting has also increased, and they attack their favorite demons without any fear of contradiction or response. But Limbaugh, Oliver North, G. Gordon Liddy, Sean Hannity, Michael Savage and Bill O'Reilly, no friends to women or minorities, get to hold forth, while opposing viewpoints or opinions from women, especially feminists, and people of color who are not conservative get minimal or no airtime. And just to respond to Professor Redish's questions, again, to my colleague Russ Neuman this morning, you know, name three liberal—high profile liberal talk show hosts. Well, let's name the ones who've been fired: Jim Hightower, Phil Donohue, Charles Grodin, Bill Maher, and Bill Moyers, who had his show cut in half on NPR. Robert Novak, however, is still at large,

and Tucker Carlson has gotten a slot on PBS. So there we go. It's hardly surprising that Limbaugh opposes the fairness doctrine on a regular basis, and over 80% of talk show hosts are male. There is no feminist, and very few even just neutral non-condemnatory female voices to challenge Dr. Laura. In fact, feminist voices have especially been marginalized as out of touch, shrill, and paradoxically, irrelevant, yet somehow simultaneously dangerous.

The fairness doctrine only covered broadcast, not cable, and it is hardly a panacea, and it will not be restored under a Republican Congress. Why would they do that? They're benefiting enormously from the demise of the fairness doctrine. But the problem of minimal ownership and/or control of broadcast outlets by women and people of color is sustained by the silencing of their voices, made possible by the demise of the fairness doctrine. Regulation and ideology have always gone hand in hand, one justifying the other. So the consolidation of media outlets into fewer and fewer hands and the exclusion of important and significant voices of opposition, especially, but not exclusively, for women and people of color, are important reasons to begin a long-term campaign to reinstate the fairness doctrine. A survey in 1993 showed that over 60% of respondents supported reinstating the fairness doctrine and the concept of equal time for opposing views. The past version of the fairness doctrine may have been too vague, may have given the FCC too much discretion, and the uncertainty it generated may have prompted some broadcast outlets to air less commentary about controversial issues for fear it always had to provide response time. And as Eric Alterman noted last night, it also reduced controversial issues to two and only two sides, so these were problems. But we should not throw the baby out with the bathwater. These can be corrected and should to finally bring true diversity to the airwaves. Thanks.

ALICIA DAVIS EVANS: Thank you, Dr. Douglas. Professor Leonard Baynes will be our second speaker on panel number three. Professor Baynes is a Professor of Law at St. John's University School of Law, where he teaches Communications Law, Regulated Industries, Race and the Law, and Business Organizations. Professor Baynes, a leading communications law scholar, served as a scholar-in-residence at the Federal Communications Commission from 1997 to 2001, and Professor Baynes has written over twenty-five law review articles on race and racism and the law, corporate law and communications law and the intersection of the three, including articles such as *Deregulatory Injustice and Electronic Redlining*.

The Color of Access to Telecommunications, White Out: The Absence and Stereotyping of People of Color by the Broadcast Networks in Prime Time Entertainment Programming and the subject of his talk today, *Making the Case for a Compelling Governmental Interest and Re-Establishing FCC Affirmative Action for Broadcast Licensing*. Please join me in welcoming Professor Baynes.

LEONARD M. BAYNES: Thank you, Alicia, and I'd like to thank Liz, Ryan and Maureen for inviting me here and for this symposium. I am proud of the fact that this will be the second time my work will be published in the *Michigan Journal of Law Reform*. My article, *Life After Adarand*, was published in 1999/2000.

Today I want to talk about affirmative action and FCC broadcast licensing. My talk is loosely based on an article that I have written entitled *Making the Case for a Compelling Government Interest and Re-Establishing FCC Affirmative Action Programs for Broadcast Licensing*.³ I have also given another variation of this talk to the FCC's taskforce on diversity.

The lack of diversity in media ownership has been an issue for the past forty years. There are still fewer than three percent of broadcast licenses owned by African Americans, Latinos/as, Asian Americans and American Indians. In 1995, in response to the *Adarand* decision, the FCC eliminated all of its then-existing affirmative action programs. During the late 1990s, I worked as a scholar-in-residence at the FCC researching the legal strategies that could be pursued to re-institute affirmative action programs at the FCC. In doing this research, I discovered how the deck was stacked against re-instituting these programs at the FCC. To establish an affirmative action program, the government has to prove a compelling governmental interest exists. The compelling governmental interest can be based on either (1) diversity or (2) proof of past discrimination by the government actor, or complicity by the government in the discrimination of another.

I will focus my remarks on the past discrimination prong in establishing a compelling governmental interest, but I have to note that in the late 1990s, a question existed whether diversity remained a compelling governmental interest. This uncertainty occurred in 1995, when the Supreme Court decided the case of *Adarand v. Peña*. Justice O'Connor, writing for the majority, raised the standard of review for federal affirmative action programs to strict scrutiny and cited past discrimination as a permissible com-

3. Leonard M. Baynes, *Making the Case for a Compelling Governmental Interest and Re-Establishing FCC Affirmative Action Programs for Broadcast Licensing*, 57 *RUTGERS L. REV.* 235 (2004).

elling governmental interest. She was silent on whether diversity, under the strict scrutiny test, was a compelling governmental interest. Her silence led many commentators to believe that diversity was not a compelling governmental interest. The Supreme Court did not clarify the uncertainty until 2003 in *Grutter v. Bollinger*, when it held that diversity was a compelling governmental interest at least in the context of university admissions. A much stronger argument now could be made that the FCC could use diversity as adequate grounds in establishing an affirmative action program. However, I leave that issue for my colleague on the panel to address.

My remarks will focus exclusively on the difficulty of using past discrimination as a compelling government interest to re-establish affirmative action policies. The U.S. Supreme Court in *Adarand v. Peña* held that if government demonstrates that past discrimination occurred, it could establish affirmative action programs to remedy the discrimination. The remedy has to be narrowly tailored.

An examination of the past discriminatory FCC action is rather unorthodox given that the FCC has historically based most of its policies, including affirmative action, on diversity. This analysis creates a paradox requiring the FCC to prove that it discriminated, when we know that there are many societal disincentives present to discourage governmental actors from making these findings. No one wants to be tarred with the moniker "discriminator." The Supreme Court's jurisprudence creates a conflict. For those who actually have been discriminated against, it basically requires them to get the possibly discriminating governmental body to prove that it discriminated.

This process undermines the very basis for which strict scrutiny was designed. In *Carolene Products*, the Supreme Court justified strict scrutiny to "smoke out" illegitimate race based classifications for two reasons: first, there was concern that the race based classification was based on an odious stereotype, e.g., Blacks are inferior or second, the racial classification was based on some sort of process defect. For example, in the South in the 1940s and 1950s, although African Americans comprised large percentages of the population, Whites refused to form coalitions with African Americans. The result was that Blacks were irrationally shut out of the political process.

This process-defect rationale for strict scrutiny evidences the Supreme Court's historic distrust of the political process when it came to racial minorities. Yet the Supreme Court in the affirmative

action context relies on these sometimes "broken" governmental authorities to recognize that it has discriminated and to then remedy the problem. This requirement is wholly inconsistent with traditional Supreme Court analysis. Pursuant to the Supreme Court's affirmative action jurisprudence the federal government has to perform statistical studies to show that discrimination is taking place in order to implement an affirmative action program. The evidence has to consist of statistical studies showing underutilization of the people of color as related to their availability in the pool as well as anecdotal studies. The governmental agency, however, is under no obligation to conduct an investigation or implement any affirmative relief. The most extreme example of the tension of the Supreme Court's jurisprudence would occur when a discriminatory governmental agency might be asked to investigate itself and refuses. How can you trust that it will do anything to remedy the discrimination? Even if the government administrators have the best of intentions, they have to find the resources to fund the studies necessary to determine whether discrimination is taking place.

In my remarks, I plan to use the FCC efforts to re-establish affirmative action programs as a case study to show the complexity and difficulty of the Supreme Court's affirmative action jurisprudence.

This morning, we focused almost exclusively on the FCC's cross ownership caps and rules. In its cross ownership deregulation order, the FCC failed to adequately address the order's effect on diversity. According to the *Wall Street Journal*, affirmative action and/or racial diversity was the very last thing considered in the FCC's order. To quote, the *Wall Street Journal* more specifically noted: "proposals dealing with cross ownership, minority ownership issues were the last elements to be finalized in the FCC order." This last-minute focus is worrisome. FCC Commissioner Michael Copps said in his dissent to the deregulation order, "These [diversity] issues should not be relegated till further notice at some indeterminate time, because they may never be addressed."

The FCC has previously considered these diversity issues. Pursuant to Section 257(c) of the Communications Act, the FCC is required to regulate and to report to Congress on the presence of market entry barriers. During the administration of FCC Chairman William Kennard, the FCC completed several statistical studies highlighting the barriers and discrimination that minority-owned broadcasters faced. These studies were released during the twilight of the Kennard administration in 2000, but they were never for-

mally reported to Congress by Chairman Kennard or his predecessor Chairman Michael Powell. To his credit, Chairman Powell opened a docket, released the studies and appointed a diversity task force. However, in March 2005, Chairman Powell resigned from the FCC and nothing has happened on the diversity since. Commissioner Copps' words that these diversity considerations should not be relegated to an indeterminate time were prescient as we see now that the FCC still has failed to address these diversity issues.

You may ask, "Why has nothing come of these studies and why has the FCC not remedied this discrimination?" The answer: The Supreme Court affirmative action jurisprudence exposes the political process defect for a governmental agency like the FCC. Although statistical evidence and anecdotal studies finding discrimination exist it may be very difficult for an agency like the FCC to actually implement programs to remedy the discrimination. This process defect is particularly hard for the FCC. The FCC never had formal findings of its past discrimination. All its previous affirmative action programs were built solely on the diversity analysis, not past discrimination. It would mean that the FCC has to reconstruct the theoretical basis for its affirmative action programs.

In *Croson v. City of Richmond*, the Supreme Court states that the past discrimination prong can be based on passive participation in the discrimination of others. The federal government has relied on this ground in establishing affirmative action programs in other venues. An example of passive participation would occur when the government has issued licenses or contracts but uses a private organization's list of available licensees or contractors to screen available contractors. If this private organization has discriminatory practices as to who may be on the list, the federal government may have passively participated in the discrimination of the private organization. In the few circuit cases that examine this issue, some have held that passive participation could also occur when the government infuses tax dollars into a discriminatory environment. By infusing tax dollars in this environment, the government has basically fostered the aiding and abetting of discrimination.

The FCC may be charged with passive participation because it distributes licenses in environments where industry members, the capital markets, and the advertising industry have discriminated against minority-owned broadcasters. Let's talk about each type of discrimination.

The Kennard administration engaged several different contractors, many of them accounting firms like KPMG, to examine the FCC's archived records to see if there were any statistical disparities in licensing to minority licensees. Interestingly, KPMG found that between 1970 and 1993, that most FCC licenses were actually awarded through a singleton process, meaning that if an applicant was the first one to actually apply for a license, he or she got the license. The applicant had a hearing but the chances of actually getting a license are much better if you're the only applicant. KPMG found that between 1970–1993, 6,178 licenses were awarded as singletons as compared to only 2,437 by comparative hearings. This disparity is overwhelming; it is almost two-to-one or almost three-to-one received their licenses through the singleton process where no minority affirmative action program existed. The affirmative action program existed only in the comparative hearing process where there was more than one applicant.

KPMG found that of those initial applicants, 74% of non-minority initial applicants remained the only applicant after they applied for the license, which meant that they had a superior chance of actually getting a license. There was no competition. For minorities who were the initial applicants, they were more often challenged, and only 35% of the minority initial applicants remained the sole applicant, and were not challenged in a comparative hearing. KPMG also found that once the comparative hearing process took place for these individuals who were initially sole applicants, the rate of actually getting the licenses was pretty much the same for minorities and non minorities.

When minorities participated in the comparative hearings proceedings, the communication industry often used the minorities as "fronts." For example, KPMG found that the number of individuals who were part of the application process was much higher on average for minorities than non-minorities (5.9 on average for minority applications and 4.3 for non-minority applications). In fact, for those applications that won licenses, there was an even larger number of individual members on the application for winning minority applications than for solely non-minority ones. For winning applications, the number of minorities as part of the application jumps off the scale (8.3 on average for applications with minorities and 5 on average for applications without minorities). These numbers represent the numerical number of minority members of the application team, not their actual ownership or control. When we look at applications where minorities actually have a majority ownership interest or control, e.g., 50% owners of the application,

applications with the larger number of non-minorities in control had a better chance of receiving the license than applications with minorities who controlled 51% or more of the equity.

The communications industry was using this affirmative action program for its own advantage. The FCC affirmative action program actually disadvantaged applications with “real” minority participation. The individuals who were winning were minority in name only, not people who actually might be able to control the license or control the content of the licensee.

The FCC’s study also examined capital market discrimination. It engaged the services of Dr. Bradford, who was a University of Washington former dean and professor, to look at these capital markets. Dr. Bradford’s study showed that minority licensees were more likely to suffer from capital market discrimination. Capital market discrimination occurs when minority applicants are less likely to get the loan than their similarly situated non-minority applicants, or if the minority applicant gets a loan, he or she pays a higher interest rate or has some other unfavorable requirement. Despite the fact that comparative hearings were studied, capital market discrimination is important because the comparative hearing process was comparable to an auction process. They both required a great deal of money to get a license. In the comparative hearing process, there were legal fees and engineering fees. Moreover, the KPMG study found that there was a very strong correlation between getting a license through comparative hearings and the amount of capital that the applicant had. The more money or assets the applicant had, the more likely he or she would receive the license. The comparative hearing process wasn’t actually an auction process, but it operated like one. KPMG found that there was a stronger correlation between gaining a license and the amount of assets that any potential licensee had, than there was a correlation between some of the other factors in the comparative hearing process.

You may ask, why am I focusing on comparative hearings when the FCC now awards broadcast licenses by auctions? The FCC analyzed the comparative hearing process for several reasons: First, the FCC used this process to distribute licenses for over forty years. Second, the comparative hearing contained an affirmative action component for approximately twenty years. Third, the FCC only started distributing broadcast licenses by auctions in 1999. Therefore it is only recently that the FCC has used some process other than comparative hearings to distribute licenses.

Minority-owned broadcasters confronted advertising discrimination. The FCC released an advertising study that showed that the advertising industry had a policy of not buying advertising on minority-owned and minority-focused radio stations called "No urban/No Spanish dictates." This policy had a deleterious effect on minority-owned radio stations because advertising is the lifeblood of broadcasters. It's not that hard to figure out this preference for more mainstream formats when broadcasters and advertisers pursue certain demographics, like the 18-34 year olds. When advertisers decide to make "buys" at certain stations, they decide not to focus on stations that have a mainly minority audience.

These advertising dictates are also paradoxical in that the mantra of conservatives is that "merit should solely matter." What is merit in this case? Shouldn't the size of audience matter?" In places like Washington D.C., Miami, or New York City which include large minority populations, the minority-focused stations are the stations with the largest audience. But the advertisers aren't going after the stations that bring in the largest audience, they instead pursue the stations that have the "right demographics", 18-34 year olds, whites mostly with high incomes, even though other stations in those markets have larger audiences in those particular locations.

Lastly, let's explore the scope of harm to the minority-owned stations from this discrimination. Because there were so many stations granted licenses through the singleton process, KPMG concluded that the overall probability, despite the existence of an affirmative action program, of winning a license for broadcast applications with minority ownership was less than it would be for non-minority applications.

All this taken together—the industry, capital market, and advertising discrimination and the lower probability of minority-owned broadcasters winning a license even in the presence of affirmative action programs, raises the remedial issue of re-establishing FCC affirmative action programs. Yet despite all this evidence, no affirmative action programs were re-established. Also most telling was that all the information and evidence was compiled and presented under the chairmanship of two African American FCC Chairmen: William Kennard and Michael Powell. Moreover, one should not forget that during Chairman Kennard's administration, there were three FCC Commissioners of color—William Kennard, Michael Powell, and Gloria Tristani. Despite the presence of all this diversity, no affirmative action proposals were passed. Why? The

Supreme Court affirmative action jurisprudence incorporates a process defect.

Chairman Powell, to his credit in his administration, created a diversity task force to examine these issues, but Chairman Powell has resigned from the Commission, and no action has been taken.

This case study demonstrates the difficulty of getting an affirmative action program re-established at the FCC. It shows how the Supreme Court jurisprudence requiring the establishment of a compelling governmental interest for affirmative action policies suffers from a severe process defect that prevents and deters members of minority groups from achieving remedial action.

In 2000, then-Chairman Kennard eloquently stated at a forum releasing the 257(c) studies at the end of his tenure as chair this process defect problem. He stated: "For twenty-five years in this country there was pretty much solid bipartisan coalition that supported affirmative action programs beginning with the Nixon administration, and that coalition unfortunately has broken down in recent years. And we are seeing in our policies and our law affirmative action being used as a wedge issue to divide us as a country just at a time when it's so vitally important that people come together around technology, because technology can be such a unifying force if everyone can participate."

What we need is a mechanism to increase the number of minority broadcasters, because as Professor Douglas indicated, the number of minority owners is still woefully small. The question that I leave you with, is how to re-establish an affirmative action program in a world where there is a very great deal of resistance to affirmative action? Thank you.

ALICIA DAVIS EVANS: Thank you, Professor Baynes. Our next speaker will be Professor Sonia Jarvis. Professor Sonia Jarvis currently serves as the distinguished Lillie & Nathan Ackerman Visiting Professor of Equality and Justice in America at Baruch College's School of Public Affairs at City University of New York. Professor Jarvis has been a civil rights activist and attorney based in Washington for most of her career. She has served as a frequent media commentator, appearing on a number of leading news programs, and is also an accomplished scholar whose research and teaching focus on race, politics and the media. She also has written several book chapters and papers. Professor Jarvis is currently completing a book entitled *Through a Prism Darkly: The Media's Impact on Race and Politics in America Since the Civil Rights Act of 1964*. In addition to her scholastic work, Professor Jarvis has served in a

number of administrative positions, including serving as an advisor on the President's Initiative on Race, where she advised the White House on race relations and drafted the final report for the President's Initiative on Race. Professor Jarvis currently serves as the President of the Black Women's Agenda, and Professor Jarvis has taught a number of undergraduate and graduate courses on race, media politics and the U.S. Constitution at a variety of leading universities. Today Professor Jarvis will speak to us on the topic "*Grutter's* Diversity Analysis: Using *Grutter* to Challenge Media Consolidation." Please join me in welcoming Professor Sonia Jarvis.

SONIA R. JARVIS: Thank you, Alicia. I'm going to try and build upon the two analyses that have proceeded me on this panel and not repeat them, even though they're critical to setting up the argument that I'd like you to consider today and discuss with us during our question and answer. First of all, I would like to say that I'm very honored to be here at the University of Michigan Law School for so many—for a number of reasons, one of course, is that to have a chance to talk at the institution that had the courage to stand up and defend affirmative action is something I think should be applauded, and I'm very happy to be here today.

The second reason is, it gave me an opportunity to see my niece, who is a freshman here at the University of Michigan—please wave at the crowd Danielle—because what we're really talking about today is what her generation is going to be facing. We've got a pretty good sense of what media is about right now, but I think the question for this panel and what we've been trying to address is where do we go going forward? And I want to take a look at the *Grutter* opinion to see if there are some clues for us in terms of how to challenge this media consolidation in a way that could be effective.

The first point I'd like to address is what do we mean by diversity, are we talking about diversity of viewpoints, are we talking about source diversity, content diversity, work force composition, affirmative action, exactly what are we addressing? And within the civil rights jurisprudence we have seen how affirmative action has transitioned from an explicit race conscious remedy into something a little fuzzier that we call diversity. We think we know what it means, but perhaps we should take a little more time and be sure we know what it means. Beyond that, I think all too often diversity's been used as a masking term so that we're not being explicit in terms of how we want to address past racial discrimination and discrimination on the basis of sex.

I would also like to follow on a point that Professor Douglas said, and that is I'm not interested in going back to the '50s. The '50s

were not a good time for my people, and I think it wasn't a good time for the country at large. And I don't think any of us really want to see a return to explicit state sponsored apartheid, but if we don't take the time to unravel some of the changes that have been done over the last several years, accelerated by the Telecommunications Act of 1996, that maybe what we have is a *de facto* system, maybe not a *de jure* system of apartheid, but we might end up with a system where women, minorities and other diverse viewpoints continue to be marginalized.

So how can we start to turn this around and at least engage the American public in this discussion so it is not simply preaching to the choir? The choir I think needs to know, but we need to expand our analysis beyond the choir. Just as a general point I'd like to ask those of you in the audience, how many of you over the past month have watched a television program, listened to something on the radio, maybe watched a cable television sports event or via satellite, either radio or television? How many in the room, at least once or twice? Okay. [A large show of hands]. How many of you have watched a program on public access channels? Okay. Well, this is an unusual group. Usually it's one or two. They don't even know they exist, even though they were set aside for the purpose of making sure that as cable television took over more of our tube there would be an opportunity for diverse viewpoints. It just hasn't worked out that way, and I think as we look towards new approaches and new remedies, I think it's important that we not get caught up in the romance of gadgets and new technologies as being the wave of the future.

Building on the earlier comments, we are seeing that within the Internet, which is being touted as alternative media, is another way of getting voices out. I like the Internet, but I also know that everyone doesn't have access to the Internet, and we keep acting as if everyone does. We watch as more and more programming migrates from free television to cable television, and no one says anything. And then we're supposed to stand by while the right wing continues its assault on basic principles of tolerance and equality and say that that's okay, because we don't have a fairness doctrine anymore. How can we start looking at ways to undo some of the damage in a constructive fashion?

Well, let's take a look at Justice O'Connor, who as you all know was the first woman appointed to the Supreme Court. Her response to a number of these issues has been interesting over time, and particularly with respect to how to understand the use of racial

classifications, racial preferences, whether invidious or benign and intended to promote affirmative action. I would point you to the *Metro Broadcasting v. FCC* decision of 1990, which is probably the high point of the Supreme Court's willingness to defer to the FCC and Congress in terms of the FCC's equal opportunity policies. Within that decision, which was written by Justice Brennan, the Court focused on an intermediate standard for review of whether or not these policies were substantially related to the goal of diversifying media ownership.

The reason I point out that opinion is that the dissent by Justice O'Connor is particularly instructive. Because in that dissent in a very closely divided 5-to-4 opinion, which we've seen on so many issues involving race over the past twenty years, she really did set forth her opinion on how the court should address the government's use of any racial classifications. And I think it is clear to say that the argument she espoused in *Metro Broadcasting* was later the majority opinion in *Adarand v. Peña*, which my colleague just mentioned a few minutes ago. The notion that with any type of remedies directed towards racial discrimination, first you have to show a past history of discrimination, and any remedy must be narrowly tailored to correct that discrimination. That really, since 1995, had been the prevailing viewpoint towards most affirmative action or race conscious remedies. And I think it helps to explain why the *Grutter* opinion was anxiously awaited by so many different quarters.

A number of commentators have argued that the *Grutter* opinion was so closely tied to higher education and the justifications were based on the unique role that higher education plays that the analysis within *Grutter* really can't be used in other contexts. So it was a one shot deal. You get twenty-five more years of affirmative action, and then that's it. I think a more careful reading of *Grutter* would lead us in a different direction.

For starters we can look at some of the language that was actually used by Justice O'Connor in the *Grutter* opinion. I'm not going to talk about *Gratz* today, although I do address that in my paper. But she pointed out a couple of issues key to this discussion. First, it was her use of the *Bakke* opinion, specifically Justice Powell's plurality opinion in *Bakke*, in terms of the importance of diversity within a student body and within the higher education context. And she went on to talk about how, in an increasingly global marketplace, the skills that today's leaders—that's you folks out here in the audience—can only be developed through an exposure to widely diverse people, cultures, ideas and viewpoints. Further, she

goes on to talk about how places like the University of Michigan are a training ground for the next generation of our nation's leaders, and that the path to leadership must be visibly open to talented and qualified individuals of every race and ethnicity, and for these reasons the law school has a compelling interest in attaining a diverse student body.

I would argue that all of those arguments apply with even greater force to the importance of a healthy democracy, that if we don't allow diverse viewpoints to have an outlet, then we are squandering the promise that's supposed to be guaranteed within the U.S. Constitution. When we look beyond just this language what I found most striking in going back was to see that the analysis as follows by Justice O'Connor in the *Grutter* opinion is precisely that used by Justice Brennan in the *Metro Broadcasting* decision. The difference was he felt he could only—he felt it was sufficient to have an intermediate scrutiny rather than strict scrutiny, and it is for that reason along with the history of how we have confronted issues of race throughout society that gives me hope that this case could be used in very productive ways.

If we go back to the '50s and the *Brown* opinion, even though the Court initially felt that it would only be confined to public education, and as most of you may recall, the court did not elect to overturn *Plessy v. Ferguson* outright, and because the court did not make that decision it meant that activists and plaintiffs had to challenge every segment of the apartheid system one by one. First, it was swimming pools, then it was movie theaters, then it was access to parks, then it was . . . well, it went on until even the Supreme Court got tired of that piecemeal approach and said, "Okay, after *Cooper v. Aaron*, *Brown* applies to all of this." And after that it took another seven years before the U.S. Congress passed the Civil Rights Act of 1964, and made that process of challenging each element of apartheid within this country not as necessary.

But having done that, we then can look to the role of the media in this process. I agree with my colleague that the mainstream media did some good things with respect to civil rights. They had their cameras there. That was the best thing they did when some of the southern officials started turning dogs and hoses on children trying to go to school. The problem was when the movement moved from the South, where issues were black and white and very clear, to the North and the Midwest and the West, where some of the most violent reactions towards school integration were experienced, whether Boston, or Los Angeles, or Denver, those are just a

few places that come to mind. And, as the movement moved away from clear black and white issues into more issues of gray and equity, and who's on first, and who gets the goodies, it became much more difficult for mainstream media to cover it in a way that I think moved us forward.

Instead, I think some of the coverage helped spur the backlash that we're still experiencing as a nation towards a lot of these issues of race and gender equality. When we look back at the period of the '60s we should remember the Kerner Commission Report, and race in that particular report: the last panel also talked about why we have, you know, had different taskforces and other independent approaches towards issues of diversity. I just want to remind you that the Kerner Commission was brought together to explain why we were having riots in all of our cities, and it was also supposed to expose whether or not there was conspiracy where you had a number of people running around the country leading these riots. That commission, which was not a liberal commission, said that the media plays a very big role in why we have systems of segregation and the fact that White Americans don't understand or know what's going on in the ghetto or in other minority communities.

So it is against that backdrop that we have to examine what has happened with not only the media over this period of time from the mid-'60s to today, but it's also important to remember that inclusion of minority viewpoints is really only a forty-year old deal. We're not talking about something that happened since the Alien and Sedition Acts [of 1798]. It only happened since the Civil Rights Act moving forward, and that's been in fits and starts. That has not been a consistent forward movement. We've tried, but as the Court changed its mind on which remedies were appropriate, the lower courts shifted their analyses as well, and so to that extent *Grutter* has taken us to what I consider a more positive place than *Adarand* or *Shaw v. Reno*. I think it will be interesting to watch how the lower courts begin to respond to challenges to the media consolidation we've been talking about over the past day and a half.

The fact that the FCC and its decisions are so critical to this process also helps to explain why the fighting over who gets to sit on the D.C. Circuit has become so intense, and it is not going to go away since we also know that the D.C. Circuit tends to be the stepping stone to the what? The Supreme Court! One of the last decisions that Judge Clarence Thomas wrote on the D.C. Circuit was on the issue of whether or not the gender enhancement rules of the FCC should continue. I don't need to tell you how he ruled. But whether or not people understand that connection and how

critical these issues will be going forward is part of, I think, the challenge of those scholars in this room and activists outside of this room in terms of taking this issue to the American public.

When they hear about what's going on, just the recent flap over the ownership change, gives you some indication that Americans do feel very deeply about this question, regardless of whether they live in a red state or a blue state. And, I think we need to spend more time identifying the issues that bring people together and upon which we do agree since there are enough forces out there that will spend time trying to pull us apart and emphasize areas of disagreement.

Now, I'll begin my wrap up since I'm going to stay on time today. I just wanted to make a couple of other quick points in terms of imagery and ownership and how we should understand how these work together. I've been disturbed by the fact that a number of minority outlets have been gobbled up over the past couple of years. I don't mind Bob Johnson making a billion dollars. That's not my point. But I do mind that the show [B.E.T.] that allowed the expression of the Black community's viewpoints on a number of current public policies issues has now been silenced, and it has not been replaced.

I also look at a magazine like *Essence*, which is supposed to be the voice of Black women. I'm sorry—I have to calm down—it's now no longer owned by Black owners. It is owned by Time Warner! And that may seem like progress to some quarters. I don't think that it is. I guess what I'd like us to talk about is how can we use this occasion of looking at media consolidation as also a way of revitalizing a civil rights approach to these issues of equity, fairness, access and democracy. Thank you.

ALICIA DAVIS EVANS: Thank you, Professor Jarvis. Our fourth panelist today is Professor Anthony Varona, who is an Associate Professor of Law at Pace University School of Law in White Plains, New York, where he teaches Intellectual Property, Administrative and Criminal Law and Sexuality, Gender and the Law. Prior to joining the Pace University School of Law faculty, Professor Varona served as the General Counsel and Legal Director for the Human Rights Campaign. HRC is the nation's largest gay civil rights organization. Before HRC, Professor Varona practiced communications law at the Washington offices of Skadden Arps and Mintz Levin. Professor Varona began his legal career as an honors program attorney for the Federal Communications Commission. Professor Varona's scholarship has included a number of articles concerning

media and civil rights law and appearing in a number of leading publications. He has lectured widely on communications law and civil rights topics and has appeared as a legal commentator on a number of well-known television news programs and in a variety of major daily newspapers and legal periodicals. Today Professor Varona will speak to us on the topic "Out of Thin Air: The Effects of Media Regulatory Dysfunction on Minorities and the Poor." Please join me in welcoming Professor Anthony Varona.

ANTHONY E. VARONA: Thank you very much. It's a great honor to join you over these two days. The benefit of being your last speaker of the three panels is that I'm able to, on behalf of everyone who has spoken on all three panels, thank every member of the *Journal of Law Reform*, led by Liz and Ryan, for putting together a fantastic conference. The other benefit to being the last speaker of the day is to try to sort of synthesize for us what we've talked about. Not necessarily synthesizing every single thread—because I can't possibly do that—but to try to have us step back a little bit and also look forward. Step back to make sure that we understand what the big picture is—what we've talked about and what it all means. How did we get to the place in which we now find ourselves? How did television regulation in particular get to be the mess that it is right now? And what we can do about it? How can we fix this dysfunction in media regulation? So I'm going to talk about three things generally, and I'm going to stay within twenty minutes.

So the first thing I'm going to talk about is just to try to make sure that we all understand—lawyers and non-lawyers alike—why it's important for us to fix the media regulatory dysfunction, how its correction is critically important for all of us, but especially minorities and the poor. By the way, that is what I like best about this symposium—that it's not just lawyers talking to lawyers, but lawyers talking to economists, and communications professionals talking to us, making sure that lawyers and non-lawyers alike understand what is at stake.

First, it's important for us to understand the consequences of "the demographically unattractive"—Andy's perfectly descriptive term—not being able to afford some of the solutions posed by some of my colleagues on the earlier other panels, i.e., satellite TV, satellite radio, cable, broadband Internet, etc. Second, it is important to get us to better understand what went wrong with television and radio regulation in particular. And third, to toss around ideas about what we could do to fix what went wrong.

I derive my comments today from a piece that I just published with the *Minnesota Journal of Law, Science and Technology* and a re-

lated article I'm working on now for publication in the *Journal of Law Reform*.

So although we've taken television for granted as "a toaster with pictures" as former FCC Chair Mark Fowler called it, television since its inception in 1941 has exerted an unparalleled influence in the shaping of our national identity and being. At its best, television, and particularly free over the air TV, has served as a great equalizer, a bridge between our diverse cultures and classes, a point of common focus that has enabled new Americans to understand what exactly America is and how we fit within it. This is the cultural DNA point that Professor Good made so well in the last panel. This point is a very personal one for me in that when my parents brought me to the United States at the age of three from Cuba via Spain, I did not learn English from my parents, because they did not speak a word of it. And I certainly did not learn English from our Italian-only speaking neighbors to the right, or Portuguese-only speaking neighbors to the left, in our immigrant enclave in Newark, New Jersey. I learned how to speak English from none other than Mr. Rogers, by watching Mr. Rogers' public television show, which certainly explains my odd fascination with brightly colored sweaters and hand-puppets. So free over the air TV at its best has much to offer. TV at its worst is what former FCC Chairman Newton Minow famously called "a vast wasteland littered with exploitative programming that does more to pollute than enrich our democracy and culture." At its worst, television serves to marginalize minority voices further by distorting our identities or rendering us altogether invisible, as shown so well by my colleague Len Baynes' groundbreaking scholarship in that area.

Those of you new to media law would have gathered from all of our talks over the last two days that Congress was presciently aware of the potentially vast power of broadcasting when it reserved for broadcast licensees a uniquely privileged status among federally regulated communications entities. In the 1927 Radio Act, and in the 1934 Communications Act, Congress codified the Broadcast Public Trustee Doctrine, also known as the Public Interest Standard, in the recognition that broadcasting held the promise of fostering a more deliberative democracy by cultivating through public interest programming a politically informed and engaged citizenry. Let's be very clear here. Unlike many other FCC license holders who have had to pay millions of dollars and sometimes, in the case of PCS and cellular companies, billions of dollars for their use of public spectrum, TV licensees get to use their licenses for

free. As public trustees, broadcasters enter into a sort of social contract with the American public. In exchange for the quid of a television license capable of generating great power and profit, broadcasters, as public trustees, are expected to deliver the quo of public interest programming—programming intended to create an American marketplace of ideas over the airwaves.

How has this doctrine worked over the last seven decades? Not so well. The reality is that the typical commercial television broadcaster today airs very little locally oriented public affairs programming, coverage of local and regional political campaigns, children's educational TV and other types of programming that the FCC has deemed public interest fare. In his January 2002 study of 142 commercial broadcast stations in twenty-four markets, Phil Napoli concluded that broadcasters aired an average of only 1.1 hours of local public affairs programming per station. Of the close to 50,000 hours of programming surveyed on the stations studied, a mere .3% was devoted to local public affairs programming. Similarly, an October 2003 study of forty-five local television stations in seven media markets found that less than one half of one percent of the average station's programming schedule was devoted to public interest fare. Another study found that in the seven weeks preceding the November 2002 midterm elections more than half of the evening news broadcasts aired in the top fifty media markets included absolutely no coverage of the campaign. In fact, the study showed that the viewers of those stations were more likely to get their coverage from the political advertising aired on those stations than the coverage itself. And even where broadcast stations do decide to devote actually programming to the coverage of campaigns, that programming has tended to be slanted to the political preferences of the station's corporate owners, as Eric pointed out so well last night.

Speaking about politics, many of us know that in the last presidential election we were shocked to learn that the major free over the air broadcast networks aired very little coverage of the conventions themselves. The total major network affiliate coverage was three hours for each convention. Let me give you a little snapshot here. At 8:05 p.m. on January 26th, 2004 the opening night of the Democratic National Convention, Al Gore, former Vice President and winner of the popular vote in 2000—I know I'm hanging on to that, but as the winner of the popular vote in 2000 addressed the delegates, viewers of commercial television would not have known that because instead of Gore's speech they were treated to reruns of the sitcoms *My Wife and Kids* on ABC, *Everybody Loves Raymond*

on CBS and reality programming on the other two nets. While Gore spoke about the importance of voting and the impact of the presidential election on the make-up of the federal courts, a topic that was given very short shrift by all of the broadcast media, Fox viewers were treated to *Trading Spouses*, *Meet Your New Mommy*, a new reality series. I have other examples of that sort of presidential convention-preempting programming, including *Fear Factor* on Fox while some key speeches were delivered in the Republican National Convention, but I won't touch that irony.

So why has the public trustee model failed and why has nothing been done to fix or replace it? Let's look at five or six reasons why the public trustee model has not worked. We've already covered a few of these, so I'll just sort of speed through them. First, what is the public interest? What is public interest broadcasting? In codifying the public interest doctrine in the 1934 Communications Act, Congress failed to define what it meant by public trustee and public interest fare, and the FCC has not done a very good job of adding meat to that skeletal framework in the statute. It's not that it hasn't tried to do so. To the contrary, it has tried repeatedly to develop a comprehensive definition of public interest programming. There was the Blue Book in 1946, which the FCC ignored almost immediately upon its issuance in the face of loud protests by the broadcast industry. There was the 1960 Programming Statement, in which the FCC came up with a laundry list of different types of programs that would satisfy the public trustee doctrine. It didn't work. The NAB around that time, or in the early '40s when the NAB was started, started balking and making noises about how the FCC's attempts to enforce the public interest standard violated the First Amendment rights of broadcasters. The FCC caved after every one of its attempts to come up with a coherent and meaningful definition of public interest programming. Then came the 1980s and the era of the Chicago School sanctification of free markets as arbiters of the public interest. The FCC, led by then Chairman Mark Fowler, decided that the free market should determine what the public interest is. No wonder, then, that the FCC decided in 1993 that round-the-clock home shopping stations were serving the public interest, because as you know, the public can't have too many five-carat cubic zirconia baubles.

So what is left? What quid are broadcasters paying for the quo of that very valuable broadcast license? Well, broadcasters have to air locally responsible public interest programming. The FCC still says that that is a public trustee standard obligation—programming

that responds to the issues of concern to the local community. As we know, the FCC is not enforcing that requirement at all, even though it's still on the books. Political broadcasting, equal opportunities, equal time rules, we've talked about those a bit. Eric mentioned them last night. In the 2000 elections, \$600 million dollars in political ad revenues flowed to the broadcasters, even though the broadcasters were doing such a poor job in covering the candidates through their news programming. Children's educational television—the FCC requires that broadcasters “serve the educational and informational needs of children.” Exactly what that means is up to the broadcasters, and that's why broadcasters have claimed such programs as the *Weird Al Yankovic Show*, the *Jetsons* and the *Flintstones*, as kid vid. And then we've also talked about the indecency regs that are the focus, really, of the FCC's actions as of late. So that's reason one, the vagueness of what public trustee means.

Reason two, the inherent First Amendment contradictions in the public trustee doctrine itself. Congress codified the public trustee doctrine in the 1934 Act as Section 302 where it directs the FCC to issue licenses consistent with the public interest. But later on in that same statute at Section 326, Congress warned the FCC not to censor broadcast communications. So you see the obvious tension there. In the 1973 *CBS v. DNC* case the Supreme Court acknowledged that tension, and essentially said that the FCC was expected to walk a tightrope between non censorship and prescribing public interest programming or the public trustee doctrine. I agree with Eric Alterman that the Lippmann/Dewey debate is an important one to think about in thinking about media regulation. But there's an even older one that really spans centuries that is at the very core of this dysfunction, and that is the debate between Justice Oliver Wendell Holmes and James Madison. Justice Holmes wrote in his 1919 *Abrams* dissent that the best truth is the power of thought to get itself accepted in the competition of the market. So that's the free market view of speech. In other words, the unencumbered exchange of conflicting ideas comes closest to yielding truth and the common good. By contrast, James Madison had a broader free speech theory. To Madison, the First Amendment was at the core of democracy itself. It was intended to create and perpetuate an educated, informed and empowered electorate, and a responsive democratic government. In contrast to the Holmesian view, which argued against government interference, the Madisonian perspective was primarily concerned with ensuring that all voices were present and heard in the marketplace. The Holmesian free mar-

ketplace of ideas perspective presumes that all viable ideas have access to the marketplace and to public consideration. The Madisonian perspective does not so presume. It is Madison's conception of the First Amendment that lies at the heart of the broadcast public trustee doctrine, and is essentially what the Supreme Court has looked for in justifying the public trustee doctrine in case after case starting with *NBC v. U.S.* in 1934, and leading up to some of the more recent cases.

The third reason why the public trustee doctrine is not working is that TV simply is not capable of serving as a free marketplace of ideas. It is narrow. It is edited. Everyone doesn't have access to the TV station and its cameras. Television is mediated, it's narrowly focused, it can be isolating, and it can be distorting of reality. The Howard Dean scream speech is a perfect example of that distortion, in that while he looked and sounded crazed on television, members of the audience later remarked that in reality his exuberance could barely overcome the crowd noise in the banquet hall.

Four—marketplace realities—we've talked about them already, right? Viewers, not public interest programming, are the commodities in the broadcasting marketplace. Five, the consolidation of broadcast ownership—no need to elaborate that point, considering that it's been the focus of our conference.

The sixth reason for the dysfunction of broadcast regulation is that of the unusual political power of the broadcasters. The FCC is the quintessentially captured agency. It is not difficult to reach this conclusion by examining the power of the NAB and how it has exercised that power in lobbying against the FCC's actions to quantify the public trustee doctrine. The NAB is one of the richest lobbying organizations in Washington. It has lavished gifts upon FCC regulators and members of Congress. In 1999, Congressman Billy Tauzin, then Chairman of the House Commerce Committee, which oversees the FCC, took a trip to Paris paid for by NAB members costing \$18,910 dollars, while his daughter, Kimberly Tauzin, was a key lobbyist at the NAB. Examples of that kind of coziness between the communications regulators and the regulated abound.

In my last three minutes I'm going to talk about proposals for reform. First, Senators Bob Dole and John McCain argued in favor of auctions, having the broadcasters pay a fair market price for their spectrum. That idea didn't float for some of the reasons that we've talked about here. Second, the Gore Commission, like a number of task forces and committees through the years, urged the FCC to implement a list of quantifiable public interest

requirements so that broadcasters would earn their keep. As it's done in the past, the FCC largely ignored the proposals. Third, some have argued in favor of adopting the British BBC model, which funds high quality broadcasting by means of an annual television set license fee. That system won't work here for relatively obvious reasons that we don't have time to get into. Fourth, former FCC general counsel Henry Geller proposed an actual spectrum usage fee of three percent of a broadcast licensee's gross advertising revenues that would go to pay or support public TV broadcasting. I like that idea a lot, but it has some problems. One is that there's no guarantee that Congress wouldn't reduce its subsidy to public TV stations so that the public TV stations would get no net increase in funding as a result of this deal. In fact, they might actually be getting less because of the displacement from Congress. Two, it would not guarantee local public interest programming. Three, it would raise some of the concerns that have been raised with the BBC, cultural elitism, etc., and by the way, let's not forget what happened recently with Buster Baxter, the cartoon rabbit and star of *Postcards from Baxter*. Baxter made the mistake of visiting Vermont in an episode on maple sugaring and, horror of horrors, included a couple of apparently lesbian mothers in a scene, causing education secretary Margaret Spellings to denounce the program as the promotion of—quote—the gay lifestyle—unquote. PBS, which is beholden to the federal government by virtue of its funding from the Corporation for Public Broadcasting, promptly pulled the program, no doubt conscious of the amazing gaydar of the Bush administration and its fundamentalist cronies, evidenced most notably by their recent outing of the flaming SpongeBob SquarePants, and the not so recent outing of the notoriously flamboyant sodomite Tinky Winky Teletubby.

My proposal in thirty seconds or less, which I'll write much more about in the *Journal of Law Reform* piece, is a sort of friendly amendment to Mr. Gellar's proposal. I propose a fee of three percent to five percent of overall commercial broadcast revenues to subsidize access to broadband Internet in underserved and poor communities. It is no secret that the United States continues to suffer from a race- and class-based digital divide and that, as President Bush acknowledged in one of his campaign speeches, we are eleventh in the world in overall broadband Internet access. It goes without saying that the Internet provides us with an unprecedented and unlimited panoply of opportunities for enlightenment, education and democratic engagement. But for many Americans, broadband access to the Internet is too expensive or entirely un-

available in their communities. Having broadcasters help provide wider access to the Internet and all of the democracy-feeding resources it has to offer would finally make it possible for broadcasters to pay their fair share. It also avoids the problems that have plagued public trusteeship in that it does not implicate broadcasters' First Amendment rights and is not premised on the beleaguered scarcity rationale. It also would help realize universal access to the truly free marketplace of ideas that broadcasting promised but never delivered.

In my *Journal of Law Reform* article, I also hope to examine how the First Amendment's public forum doctrine may serve as an alternative to public trusteeship for purposes of the public interest programming regulation, and as an additional justification for the broadcast to Internet cross-subsidy. Those of you familiar with First Amendment jurisprudence know that the public forum doctrine has both reactive and affirmative aspects. Reactive insofar as the Supreme Court applies varying levels of First Amendment scrutiny to speech regulation in public fora, and affirmative in the sense that implicit in the Supreme Court's public fora precedents is an affirmative duty on government to create and maintain public speech fora for democratic engagement and debate. The Internet should be viewed as such a public forum, or amalgamation of fora, and broadcasters should help make it accessible to all. There will be much more about this in my piece in the *Journal of Law Reform* so you'll have to stay tuned for that. Thank you.

ALICIA DAVIS EVANS: Thank you very much, Professor Varona. After this panel, I'm sure there are a number of questions, so I'd like to ask those who would like to ask questions to be as brief as possible, and I'd like to ask the same of our panelists when responding. Yes? Can we get the microphone down here please?

AUDIENCE MEMBER: Tony, I enjoyed your talk. I didn't think you were going to go where you ended up going, but the question I wanted to ask, which may be mooted by where you ended up, concerns newspapers. With the exception of the *New York Times* I haven't seen a generally just daily newspaper worth a d** in this country, and even the *New York Times* fails miserably when it comes to quality funnies, whereas national public radio and CNN I find far more sophisticated analysis. What if we took everything you're saying and the public interest standard, picked it up and plopped it down in newspapers? Would that be constitutional, and if not, what's the basis of the distinction?

ANTHONY E. VARONA: Well, we would certainly have to go back to the case and the fundamental distinction between newspapers and broadcasters.

AUDIENCE MEMBER: What was that distinction?

ANTHONY E. VARONA: Broadcasters do not own their newsprint. Broadcasters use our spectrum, and they're using it without giving us back something that is of value. Some would argue, and I could also make this argument, that broadcasters actually are giving us back something of value, but it's not the fair market value of their spectrum. Every one of us can publish a newspaper in this room if we had access, and Judge Bork has actually made this argument—you can argue that it's very expensive to get newsprint and to get a press up and running. That's true. But that's a different kind of scarcity. What we're talking about in the over air broadcast medium, is allocational scarcity. It is the sort of scarcity that points to the fact that there are just so many frequencies available in each city. There is not that kind of scarcity when you're talking about newspapers.

AUDIENCE MEMBER: This question can be addressed to any of the panelists. But when we discuss diversity in the media we tend to focus on African Americans and women, which is obviously very important, but there are also other minority groups, and you know, one that concerns me personally is the portrayal of Arab Americans in the media, which I think is a huge problem right now. The solutions offered by the panelists, do you think that they could be applicable to these fringe minority groups that lack any sort of political power or any sort of popular support at this point?

SONIA R. JARVIS: Well, I'd start by saying I don't view them as fringe, that we're really talking about the minority population right now being 30% and growing, and what responsibility do broadcasters, newspapers, other media outlets, have to make sure that people within that third of the American population have access. There have already been studies showing how over the last couple of years portrayals and imagery concerning Muslims and other Arab Americans have worsened, and where's the counter to that? Where are we going to see that counterweight being exerted?

I'm not even sure a fairness doctrine, which the prospects of having that restored I would say are minimal to none, is one answer or even the public interest doctrine that Professor Varona just mentioned. I think it's got to be through actions of American citizens and people of good will to attack negative imagery when it appears, but also to continue to make the argument that part of being in a democracy means having your entire experience re-

vealed, not just when you're in trouble or being accused of being a terrorist. So it's how to make sure that using that argument as a way of connecting up with African American groups, and Latinos, and Native Americans and others. As you may recall, the NAACP was criticized for cutting a deal with NBC on diversity and a number of the other minority groups felt that that [deal] hurt their efforts to force all of the broadcasters to do more. So it needs collective action in a way that's consistent with the needs of your own community, but within the broader context of what we're trying to do within a democracy.

LEONARD M. BAYNES: I'm working on a project examining how to regulate broadcast television news stereotypes. My proposed regulations would include all U.S. racial minority groups. Some may say that the First Amendment prohibits any such regulation. In the U.S., many use the First Amendment as a means to thwart any regulations that they do not like. However, I believe that this is an overly circumscribed view of the First Amendment free speech protections. I also believe that people's views on the First Amendment expand and contract depending on the issues. With some content, like indecency, we as a society are ready to regulate. The Supreme Court permits the FCC to define broadcast indecency. As a society, we are comfortable letting FCC regulate that.

When it comes to images of people of color, American society seems more reluctant to have these kinds of regulations. But as people of color, we need to be active and demonstrate collectively that these images are wrong. They're just as harmful as indecent images. If people say indecency's wrong, why aren't images of people of color that are clearly stereotypical not also wrong? That's the question. Many First Amendment scholars would express horror at such regulations. As a result, nothing happens about them. But we have to be active to write proposals, lobby for them, bring them to the Supreme Court. We do not know whether they are unconstitutional until the Supreme Court decides. If we limit our vision about what is right before we know whether something is constitutional, we have stifled our creativity. We can only get these images changed through grass root activism and for people to talk about the damage that these negative images cause. We need to design proposals to combat them because if the FCC can determine whether something is "indecent," then why can't it also determine whether some image is a stereotypical depiction?

ALICIA DAVIS EVANS: Yes, sir. In the back?

JONATHAN ADELSTEIN: Thanks a lot. I'm Commissioner Adelstein, and I want to note I'm not captured yet. A question on minority ownership. I'll note tonight in the presentation that minority ownership of media outlets is at an all-time low. I think that might help to address the previous questioner's concern about reflecting what's actually happening in the communities. Certainly, our ownership of media does not reflect the broader population here, and as we confront the ownership rules that are now under review I just wanted to get your perspective on what the FCC can do when it comes up with new media ownership rules to ensure that there's a wider ownership of outlets by minorities? [Inaudible comments]

LEONARD M. BAYNES: The FCC needs to re-establish affirmative action programs. The studies that I discussed in my presentation present a sufficient basis for establishing affirmative action programs. The difficulty that the FCC may have, which I discussed during the FCC Task Force hearings, is that the FCC has historically relied on diversity for its affirmative action programs. Assuming that *Grutter's* analysis extends to FCC licensing and diversity can be used as a factor in awarding FCC licenses, the issue becomes, how do you have an individualized determination as *Grutter* provides? Pursuant to an individualized determination, the FCC would have to consider race as one of many factors in awarding a license. However, the decision cannot be mechanical and there would have to be a holistic review of each applicant. In my article: *Making the Case for a Compelling Governmental Interest and Re-Establishing FCC Affirmative Action Programs for Broadcast Licensing*⁴ I suggest that the FCC could internally evaluate and select candidates who would then participate in an auction process. The process could be similar to the C-Block auction of wireless spectrum. The criteria for this block could be the provisioning of programming that people of color might be interested. The special auction could not be conducted solely for applicants of color. Pursuant to the diversity rationale, an auction geared to diverse programming would likely be constitutional.

If the FCC relied exclusively on the past discrimination rationale for re-establishing affirmative action programs, the FCC could remedy the past discrimination and could have a narrowly tailored auction solely for applicants of color. The contours of such an auction would have to be worked out so that the remedy, i.e., the

4. Leonard M. Baynes, *Making the Case for a Compelling Governmental Interest and Re-Establishing FCC Affirmative Action Programs for Broadcast Licensing*, 57 *RUTGERS L. REV.* 235 (2004).

exclusive auction would have to match the harm. It probably would make sense for the FCC to base any re-establishment of an affirmative action program on past discrimination and also diversity. And if they use both of those bases an affirmative action program probably would be permissible.

SONIA R. JARVIS: I think another issue is how do we get past the chicken and egg problem of trying to demonstrate the problems of opening the process to more minority ownership when the numbers are, as you noted, at an all-time low. So what is it going to take to get sufficient numbers to demonstrate that barriers to ownership continue to exist? And I would challenge the folks here to do some studies and articles for this journal and others to help make that case, because that is what it's going to take.

AUDIENCE MEMBER: When we talked earlier about the coverage of the civil rights movement by the media, would you think it would be fair to say that a fair proportion of the reason that they did that kind of coverage is because of the sensationalism of it at the moment, because it was a ratings grabber—because it was something that they thought people would be interested in seeing, and it would get them more viewers, and that part of the reason that we're not seeing those kind of issues as much now is that there are more sensationalist elements that they can turn to instead that are provided by other people, by the government, by corporations, that they can turn to instead and that with that impetus removed they've basically just fallen back? In other words, there really hasn't been that much change in the media, they haven't been corrupted, it's just they've just used a different source for their ratings grab.

SUSAN DOUGLAS: I think what Sonia and I were saying, although we hadn't planned this, is that television news in particular was the civil rights and the women's movement best ally and worst enemy I would say at the same time. And, television news, just like any media, is very incoherent and filled with contradictions. Television news started with people like John Cameron Swayzee doing the Camel News Caravan where he was required to smoke Camels, while he was reading the news, and it was fifteen minutes of rip and read. And what the civil rights movement did is it brought these incredibly powerful images to television, and it drove the news, which was fifteen minutes, to go to half an hour. So one, they had the images. The images were incredibly powerful. It was a huge national story. Yes, they were sensational. There was a conference here several years ago about sort of the coverage of race over time in the media, and one of the things that happened, and however

self-serving or self blinded this was, there were journalists from the north, and even liberal journalists from the south, who were so horrified by the racist segregation stance of White southerners that they were determined to expose that, and some of it came from geographical snobbery, and some of it came from class spite. But all of these things interacted, and also, television news was new. So all of these things came together to make the civil rights movement a huge story. And as Sonia said when that footage in 1963 from Birmingham aired it had a lightning effect on public opinion when people saw those kids being hosed down and those german shepherds coming at them. So there have been moments when this coverage was great. But by the time just a couple of years later when you start getting the uprisings in Newark and Detroit and elsewhere, that coverage was no help to Black folks. The coverage of the Black Panthers absolutely demonized Black power. So it was a mixed bag. Same thing with the women's movement. This was huge story. Here were a bunch of women transgressing every kind of value that's supposed to be sacrosanct about femininity made it a big story. And feminist demands were simultaneously marginalized and ridiculed all throughout the national news, but feminists got a podium. They got long sound bytes. The news was different then too, people got longer sound bytes. And so yes, what's happened now is there's just a very different calculation in the news, and there is a different sense of what will grab viewer's attentions and what they care about, and that calculation is they care about J-Lo's latest romantic relationship. They care about Lacey Peterson. They care about the Jackson trial. To get back to the first question, they don't care about what's going on in the average streets. I actually think a lot more people care about what's going on around the world, including what young people are thinking in Egypt and Saudi Arabia, than anybody gives them credit for. But I do think you're right. But I wouldn't say that the motivations were purely cynical or sensationalist back then. I think there were a lot of unfortunate biases that entered the coverage over the civil rights movement and the women's movement.

ALICIA DAVIS EVANS: I'd like to ask the next question. I'll direct it to Professor Baynes, but I'll be happy if anyone on the panel would like to take a stab at it. Dr. Martin Luther King once said, "What good is it to have the right to sit at a lunch counter if one cannot afford the price of a meal?" And, Professor Baynes, you alluded to this during your PowerPoint presentation about the difficulty of women and minorities accessing the capital markets to be able to afford to participate. Can you elaborate a little bit more

on some potential solutions to that very important problem as well?

LEONARD M. BAYNES: Sure. First, we need to make sure that the laws that prohibit banks from redlining communities of color and providing access to credit to borrowers are enforced. Second, the FCC should join forces with the Small Business Administration to create a program specifically for the particular needs of small broadcast applicants that want to get licenses. The FCC has previously experimented with different kinds of programs that have helped finance a loan over the term of the license. Unfortunately, this program was badly enforced since the FCC did not have the wherewithal to monitor these loans and several of the licensees ended up in bankruptcy court. These programs need to be re-examined because on its face it's a perfect solution. It allows the small licensee to pay for his license over the term of the license. Maybe the program needs to be modified so that the FCC ensures that the applicants are credit worthy. Instead, maybe some banking association or the SBA could monitor the loan to provide the funding.

But Professor Evans is right, as licenses become much more expensive, it becomes much more difficult for any small owner to afford them. The owners of color may have to depart from diverse programming in order to pay their expenses. For example, in New York, WLJB is an AM station that has historically been a Black station. It was the only station in New York that actually broadcasted news and music to New York City's large Afro-Caribbean community. At least thirty percent of the Blacks in New York City are foreign born. Maybe fifty percent of the people of African descent in New York City are of Caribbean ancestry. Because of the advertising discrimination that I discussed in my formal remarks, WLJB decided to broadcast Air America. As a consequence, the Blacks of Caribbean ancestry in New York City are no longer able to get the kind of broadcasting that's useful for their particular community. This situation is a combination of two factors: First, how do small minority broadcasters afford to get an FCC license and once they have the license given advertising discrimination, how do they raise funds to sustain the station? Can you fault the broadcaster who can make more money with less diverse content? Rational business persons want to maximize profits, even though they're not able to necessarily serve their particular community. We have to explore creative programs to allow these business people to maximize profits and still serve the minority community.

ALICIA DAVIS EVANS: Yes, sir?

AUDIENCE MEMBER: I just wanted to suggest that the I think almost all of the panelists have suggested that new creative thinking about structural regulations is one of the things that people in communication schools and law schools ought to be encouraged to do. So just in reaction to Commissioner Adelstein's question, not talking about its political viability, but as an imaginative response, the notion is that the FCC has to approve the licensees and the public interest, and so when you have hearings and [inaudible] licenses you had to make that one of the comments that was made by an earlier Commissioner about, "This is a h** of a way to run a railroad," was that, you do all this stuff, and you pick out the best [inaudible] and two weeks later it's sold to the person that had the most money. One could imagine that if you think the current licensees, which you officially do by having a license, is in the public interest you can say, "If they transfer it we don't have any reason to have confidence that the person that receives it is in the public interest," and say, "Any time there's a transfer of a license, which is basically a sale." I've always regretted the idea that we say that people get their licenses free. Most corporations get their licenses by paying a huge amount to them, which is not for the government—or not for the public, but they pay for them. They capitalize the income stream in that payment. But the FCC could say, "We don't assume that the person that's getting it is in the public interest." However, the FCC could say, "If it increases diversity, because you're selling it to a minority community, or if you're reducing the level of concentration in the industry, so you're selling it to somebody that owns less media properties than the person that's selling it, then we'll presume that is in the public interest," and if you did that you would fairly quickly and with high pressure push ownership of the media, I mean, given that there's constant switching of who owns it, in a direction—and you know, people would still be able to sell, but [inaudible] sell to a conglomerate owner, because that wouldn't be presumed to be in the public interest. So you'd open it up to comparative hearing. And if you could sell to somebody else like minority community or somebody who's ownership would de-concentrate the industry and have that person need to be in the public interest, then you'd quickly move towards a—from the types of things discussed here, a better set of ownership distribution. Now, I'm not suggesting that's viable, and I'm not even sure that I would go with that in the long run, but that's the type of thinking that I think all the people on the panel have been calling for is thinking of new ways to think about how the government in-

teraction with the industry can create a better structure of ownership.

LEONARD M. BAYNES: The FCC used to have anti-trafficking regulations that would actually limit the “flipping” of broadcast properties. Once a licensee acquired a license through comparative hearings, the licensee was required to hold the license for a number of years before selling it. As part of FCC deregulation, the anti-trafficking regulations were eliminated. The FCC also used the tax certificate program, which would allow a majority licensee to defer capital gains if he/she transferred a broadcast property to a minority buyer. Research indicates that this program was the most effective in increasing minority ownership. This program was eliminated in 1995. A lot of the mechanisms that were in place are no longer in place. And so the question, what do you do now? I think the best thing is to sort of aim for the most that you possibly can get and see what happens.

ALICIA DAVIS EVANS: Well, great. Thank you to all of our panelists. We are out of time. And now Dr. Douglas will give us a few closing remarks.

SUSAN DOUGLAS: Very few closing remarks. I want to thank everybody for coming to this terrific conference. I think, you know, we’ve had a really lively discussion with multiple perspectives, and a host of differing expertise brought to the table, and now unlike what we get to see on most public affairs broadcasting on television—which consists of verbal food fights and/or pundits who really have no expertise about the subject under discussion holding forth nonetheless—this was actually a respectful and illuminating and very thought provoking exchange. We had debates and discussions about what constitutes diversity and how do you measure it. We got a lot of information about different court cases and/or precedents that could enhance or inhibit public discourse that could help us think more creatively about what to do in the future, and what could promote diversity in the media. We had very interesting thoughts about First Amendment within a dramatically shifting ownership and regulatory environment, and we got even some proposed solutions for people to think about. So, I certainly learned a great deal. I hope you did too, and I first want to thank all of the panelists who came to Michigan to participate in this. So please join me in thanking all of the panelists. [Applause] I also want to thank, one more time, because you can’t thank them enough, these two incredibly energetic, dedicated, enterprising law students—Ryan Calo and Liz Wei—who put together a fabulous

event, and worked like dogs on it. They deserve yet another big round of applause. So thank you again for coming. It's been a real delight to collaborate with the law school for us in communication studies, and Liz Wei has some final remarks she'd like to make.

LIZ WEI: Thank you, Professor Douglas. I just have two quick points. For those who've pre-registered for the banquet and only for those people I want to remind you that it's going to be tonight at Campus Inn. Commissioner Jonathan Adelstein will be our closing Keynote Speaker, and dinner is to be served at 7:00. So if you could arrive earlier, any time after 6:30, would be great.

For Ryan and I, one of the driving forces behind putting on this Symposium was not only our interest in the topic of media concentration, but also a reaction to the absence of any media law classes here at the University of Michigan Law School. But of course our logical solution was to bring all these fabulous and wonderful experts and practitioners here to us. So by default to all of you as well, and to the readers of our journal. And that was a wonderful decision. I'm sure you'll agree with me, as our panelists have been dynamic and have only left us with more questions. Which is as I believe it should be. So if you will join the *Journal of Law Reform* one last time as we thank all our wonderful panelists today. [Applause]

CLOSING REMARKS

LIZ WEI: We're all very honored to have, as our Keynote speaker tonight, Commissioner Jonathan Adelstein from the Federal Communications Commission, and we were very lucky that he would be able to work this into his schedule. So here to introduce him is Professor Molly Van Houweling.

[Applause]

MOLLY SHAFFER VAN HOUWELING: It's only thanks to Liz and Ryan's excellent organizational skills that they were so foresightful to get on the Commissioner's schedule a year in advance which is why we are all so fortunate to have him here tonight. I met Jonathan about ten years ago when he was a staff member for Senator Tom Daschle, and followed him then as a true public servant, and he's shown that even more so, I think, in his service at the Federal Communications Commission, where he's been in the middle of some of the most controversial issues that we've talked about during the course of this conference, and in some instances, on the dissenting side of those controversial issues, where he's been an eloquent spokesperson for the public interest. And, I think today we've heard about the metaphor with television as a toaster with pictures, and Commissioner Adelstein has worried that in light of recent deregulatory moves we might only get Wonder Bread out of our toaster with pictures. [Laughter] So we're honored to have him. As I said, he was previously a staff member, a Senior Legislative Assistant for Senator Tom Daschle, where he worked for seven years working on issues including telecommunications, financial services, transportation and banking, and other key issues. Before that he held a number of other positions on the Hill, including staff member to the Senate's Special Committee on Aging for Chairman David Pryor, an assignment as a special liaison to Senator Harry Reid, and as legislative assistant to Senator Donald Riegle, Jr. of Michigan. Before his service on the Hill he had several academic appointments at both Stanford and Harvard, and tonight he'll honor us by educating us, which I'm looking forward to. So please welcome FCC Commissioner, Jonathan Adelstein.

[Applause]

JONATHAN ADELSTEIN: Thank you, Molly. I did not realize anybody remembered my "toaster with Wonder Bread" popping out comment. In the midst of all these great debates about regulations and what the rules are going to be, we also are spending our

time trying to come up with just the right metaphor. So I am glad that my dear friend, Professor Molly, remembered it all these years later. [Laughter] And it is, thanks to her, that I am here. She told me a year ago that Michigan was sunny and beautiful in the middle of August. Now, I have some friends on the FTC, and there may be a false advertising claim here.

It is good, though, to be back in Michigan, especially to be part of such a well organized conference. The students that put it together did a fantastic job, and with a great group of participants—I have heard some of it, but not all of it. Extraordinary! I think everyone knows I take my media ownership hearings around the country; I want to make sure law students organize them!

I did get my start in Washington actually working for a senator from Michigan. So it is appropriate that I am back here. Molly mentioned Senator Don Riegle from up the road there in Flint, and we have been back here in Michigan recently as part of our effort to reach out to the public.

We were in Dearborn this last September for a meeting that some of you might have attended to talk about these issues. It was coordinated by Free Press. We had more than 300 local citizens come out to share with us their views on how the media here is serving all of the different interests and people in this community. These types of discussions are exactly what we need now at the FCC. Particularly, I think scholarship and input from the academic community is so important as we try to figure out how we are going to intelligently oversee broadcasting and media so that they best serve the public interest. And of course, we also need direct input from local communities on how broadcasters are serving or not serving those local communities. And there is only one way to do it, which is to get out of Washington—go outside of the Beltway and come to places like Dearborn and Ann Arbor and hear from people that are actually affected, people that have the time to think this through. And that is what we need to do now as the Third Circuit remand, that Andy Schwartzman had so much to do with, has put this whole issue back on our plate and asked us to start from scratch to determine what the proper landscape should be in the media going forward for generations to come.

Now, when we are in Washington, even though it is a beautiful day there, sixty degrees and sunny, [Laughter] we have so many broadcasters, and media companies, and their lawyers. All of these hired experts wear the carpet thin at the FCC, and of course, also in the halls of Congress. But, sadly, we really do not get as much input as we need from smart, dedicated, thoughtful people and

from the public at large, and that is why we need to kind of reach out. And we have reached out to try to get a broader perspective on these issues, and that is why today's panels are so important. I look forward to seeing the transcripts of those I missed. I would ask you to make the entire proceedings part of the FCC record as we go into another media ownership proceeding. I think that the entire discussion today belongs on the record so that not only me, but all of the Commissioners, their staffs and the Media Bureau have the opportunity to review what came out of today.

And in light of the discussion that you have held, and the need for information from groups like this, I really think I need to keep an open mind, and all the Commissioners do, about what the right place to go from here is with these rules. But I do think there are some basic fundamental principles that should guide our decision making. I would like to just talk about some of those here today.

In particular, I would like to focus on the issue of diversity, which has been a discussion that I think has threaded throughout this program. And as you know, the Third Circuit remanded much of what we did as mistaken, and I share a lot of the court's concerns. And it may not be that coincidental because a lot of the court decision does track my dissent in that item, and I certainly hope the Supreme Court will let the Third Circuit's decision stand. So we will see what happens, because right now, as a lot of you know, appeals have been filed by broadcast and newspaper interests, NAB, Fox, NBC, Tribune and Viacom, among others. You have all of the big media giants that want nothing more than to get bigger and are trying to get the Supreme Court to take up that decision and basically knock the legs out from under all of the bases for broadcast regulations in this country. I think they may learn that if they were successful, and I hope they are not, that in some ways it will also come back to bite them, because if they are not treated specially in the terms of ownership rules, then they may lose the opportunity to be treated specially in other ways that they find are of great benefit.

Now, we have seen conditional cross petitions filed by the federal government, and by Sinclair, but the government wisely encouraged the Supreme Court not to take up the issue because we do not want to lose the basic underpinnings of all the broadcast regulations that would lead to our ability to enforce things like indecency rules, for example. My concern, much more than that, though, is the role of the media in the functioning of our democracy. In order to get that right—clearly we got it wrong before—we

need to start from scratch, and that is what the Third Circuit remand gave us the opportunity to do. Now, throughout the day, I am sure you have heard about the historical underpinnings of FCC regulation and congressional dictates on this. The real goals of the public interest standard are to promote competition and diversity. And of course, they are also designed to promote localism and the responsiveness of broadcasters to their own local communities. Localism has been a hallmark of broadcast regulation since it began, and that is why we do not issue national licenses, as they do in some other countries. We always deal with the local market, but then this needs to become more nationalized in terms of the distribution of these networks, so you wonder about the roots of our policy and whether or not the basic direction that underlies our regulation is not being lost.

Just to go back to our roots, Section 307(b) of the Communications Act clearly states how broadcasting is locally based, as it says that "the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." So this was Congress' intention.

Now, among these issues, I think diversity and localism should be of the greatest concern to the FCC. Competition is very important. I think you have heard it discussed today that antitrust authorities exist to deal with anti-competitive issues, and they do that very well. They have mechanisms that in some ways are better than ours to get the kind of information they need under confidentiality to make certain decisions about competitive issues and market issues. In a strictly market sense, advertisers are the most direct consumers of broadcasters. But the FCC is truly most concerned with listeners and viewers. To be clear, competition is important, and the FCC does have a role to play, because we have a unique expertise in communications that enables us to provide a special perspective on competition. But *only* the FCC can protect diversity and localism. The DOJ and FTC have no authority in this area, and these areas are crucial to the functioning of our democracy.

The Telecommunications Act of 1996 did not undercut the importance of these goals in any way. If you look at Section 202(h) of the Communications Act, it instructs the Commission to look at our rules biannually to determine whether they continue to be "necessary in the public interest as a result of competition," so we must affirmatively determine whether or not we maintain the rules.

However, the overriding obligation is to change a rule only if it no longer is in the public interest. Now, contrary to the contention of some, the omission of diversity explicitly there does not in any way eviscerate the goal, because the 1996 Act specifically directs the FCC to take diversity into account elsewhere. And the courts have subsequently vindicated the continuation of diversity as a goal that the FCC can, and I think must, pursue in order to discharge its duty to promote the public interest.

So a lot of what you talked about today is what we mean by diversity. And I want to talk about the importance of diversity of viewpoint, in particular, because over the years the FCC identified many different types of diversity in its ownership regulations that we are trying to promote through these limits, such as format diversity, programming diversity, and source diversity. But of all of these, viewpoint diversity is the most important. In fact, the purpose behind promoting these other kinds of diversity is often, at bottom, promoting diversity of viewpoint. This is especially critical because in terms of news and information and issues of public importance, diversity of viewpoint is what matters most. Exposure to different ideas in these areas is how people educate themselves and how citizens are able to conduct themselves in a democracy by intelligently and meaningfully participating in a democratic society.

As a result, the courts have long and repeatedly recognized that the goal has a constitutional dimension in that it furthers First Amendment values. For example, go back to *Associated Press v. U.S.* in 1945. The Supreme Court held that the First Amendment, "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." And that bears repeating because that is the law of the land, and that is really our touchstone. In a society such as ours that treasures its free expression and limits on government regulation of speech, the best way to promote the goal of viewpoint diversity is through ownership regulation. Indeed, because of the deregulation of the industry, it is virtually all that we have left, to the degree that we are able to maintain it. The means are obviously indirect, to be sure, but more direct mechanisms would be more constitutionally suspect. Take, for example, *FCC v. National Citizens Committee for Broadcasting* in 1978. In upholding the newspaper broadcast ban, the Supreme Court said that the Commission had acted to enhance the diversity of information heard by the public without ongoing government surveillance of the content of speech.

So this is the way that the Commission can do it—through these structural regulations.

And I do not think that reasonable minds really can differ that ownership matters. Whether or not you think it is appropriate for us to be involved in regulation, it certainly matters in terms of what the public is going to hear. The FCC talked about this in 1975 when it adopted the newspaper broadcast cross-ownership rule in the first place, saying that ownership carries with it the power to select, to edit and to choose the methods, manner and emphasis of a presentation. Obviously, this is the case. In the 2003 media ownership decision, to its credit, despite all of the bad thinking and ill-reasoned logic that was behind it, at least the FCC again affirmed that ownership matters.

What the FCC recognized decades ago remains true today and will remain so in the future, particularly as media outlets become more explicitly linked with ideologies and viewpoints. I am afraid that we are losing the notion that journalism is supposed to be independent or even has to pretend to be objective. Somehow, now it seems okay to be explicitly ideological. And if that is the case, then it is even more important that we have a diversity of viewpoint. I am not saying whether I agree or disagree with a particular perspective because I do not think that matters at all. The point is that if there are a lot of different viewpoints available over the air, then the public can make up its own mind and not have it made up by a disproportionate influence that is resulting from the domination of the airwaves by any particular owner or any particular viewpoint or small number of viewpoints.

Again, the means/ends relationship is not perfect. Not every different owner will provide a different viewpoint, nor does every owner even try to express a viewpoint over the air. But that is not for the FCC to have to prove one way or the other—our rules are content neutral. To be more direct would implicate constitutional concerns more than what we currently have with the ownership regulations. So *Red Lion*, which is really our touchstone here, remains good law. But the authority that the case relies upon, and the authority on which our ownership rules rely, is not entirely reliant on spectrum scarcity. The standard also relates to content regulation to promote viewpoint diversity. But spectrum scarcity is still correct. If spectrum is not scarce, and I cannot imagine why broadcasters are spending so much money to buy up stations with these licenses. I was with some brokers for media properties and talked about radio licensing—some are going for around \$100 million now and some television stations are going for around \$800

million. But somehow my colleagues that voted the other way than I did in June of 2003 were arguing that free over-the-air television is going by the wayside and that these broadcasters were in trouble. Then the broadcasters started reporting record profits and record advertising revenues. It is not our job because some of them are losing money to make sure that they all make money. I guess that was not universally agreed upon by the Commissioners, but maybe in hindsight they have reviewed their thinking and will change their mind next time around.

If you really think about spectrum scarcity, the theory is not based on scarcity of media outlets as some attempt to argue. It is instead based on the scarcity of the public airwaves. If one station gets to operate on Channel 4, nobody else gets to operate on Channel 4 in that time. If somebody gets 98.7, then it is the only licensee that is going to be able to operate there, and we will enforce the licensee's right to operate exclusively on that channel. So, because diversity of ownership matters, it is also important to have diverse owners, and the FCC has independent statutory authority to diversify owners. I do not think we have exercised it as much as we should. There was a good topic of discussion in our third panel today, but I think it bears repeating, going right back to the statute again, to think about whether we are actually doing what the law requires. Section 309(j) instructs the FCC in licensing new stations through competitive bidding to promote equal opportunity by "avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including . . . businesses owned by members of minority groups and women."

There are certainly constitutional sensitivities that are implicated by implementing this policy. That is why I raise it today, and I think we need to talk a lot about how we work our way through those issues. But that is what I am directed by Congress to do, and that is what we should be doing more than we currently are at the FCC. We now have the lowest level of minority ownership in the history of broadcasting ever since the statistics have been compiled. I talked to Professor Baynes about this today. The FCC does not now have anything on its books to promote this goal that Congress asked us to promote. As a matter of fact, in its 2003 Order, the FCC eliminated the only rule that we had on our books, which was designed to ensure that minority broadcasters have a shot. It was the so-called "failed station solicitation goal," and it was designed to ensure that minority broadcasters could learn about financially

troubled stations which were more affordable when they came onto the market. In the repeal of this rule, the FCC did not even analyze how this would impact minority ownership. The Third Circuit recognized how egregious this was and said that the Commission was failing to meet its responsibilities under Section I of the Act, to make spectrum available to "people without discrimination on the basis of race." How embarrassing is that to a federal agency to have a circuit court say that we are not even doing that? And I hope that we do better next time. I hope that not only will we support the mechanisms which are designed to promote minority ownership, but we also will find more means of enhancing and expanding opportunities for minority ownership.

If you think about the issue solely in terms of diversity, it is usually better to have fifty-one voices than fifty, but there are trade-offs on other concerns. I understand that some combinations may ultimately be in the public interest, particularly where we can preserve voices on stations that otherwise might go dark. If you have a station that is not providing any news or any real responsiveness, then if somebody else buys it, it can enhance local service. These are always possibilities, and the challenge is to determine what are the right levels where you can draw that line, and it is hard to do with a "one size fits all" approach.

That is why I have always thought that the case-by-case approach has some merit, particularly if it were properly enforced. My fear about a case-by-case approach, though, is that the lack of bright lines gives the possible appearance that the Commission does not have a deep commitment to the public interest, and that we might administer in practice something akin to a rubber stamp. Also, the case-by-case approach may not meet its theoretical promise of actually ensuring that each transaction somehow benefits the public and not just the broadcasters who seek to merge. I am not opposed to bright line rules and the many advantages that they have, such as predictability, but the FCC is always going to retain its ability to adapt its standards to any given case. Our statute is very clear about that. And again, Section 309 requires us to determine in the case of each application filed with the Commission whether the "public interest, convenience and necessity" are served by the granting of that particular application. So we have to ultimately make sure that each one meets that standard. The idea of these bright line rules is not to come up with some arbitrary decision about what does serve the public interest. I could not believe the lines that were drawn on June 2003 saying that ninety-five percent of the country could be served by duopolies is a matter of automatic public interest benefit,

or ninety-seven percent could benefit from having the newspaper broadcast cross-ownership rule eliminated. Those are not bright lines. Those are kind of pretty dull lines—pretty far out toward the end zone.

I was also troubled by the end of the practice to flag of radio station transactions that may require careful FCC review before final approval. We used to look at those radio cases where there was a lot of concentration, and then we would subject them to extra scrutiny in most cases where there was an issue presented, even when they complied with our numerical limits. But we did away with that, and that has not been restored despite protestations by myself and Commissioner Copps.

So, whether you are analyzing ownership under general rules or on a case-by-case basis, we need to understand that, of course, not all media are created equal. Again, I understand this was a discussion that went throughout your panels today. For example, we know from our own studies that TV is the primary source of news and information for most Americans. When people talk about other news sources and technology, they are usually talking about the Internet. We think the Internet is wonderful. That is my day job, trying to get broadband out there to people. But that does not mean that it is in some way a substitute for television, radio and newspapers. And with respect to local news, it is broadcast TV and newspapers, in particular, that people really get their information from. And the FCC decided and recognized in its own diversity index, as poorly constructed as it was, that cable is not often the source of independent local news. News-only cable channels are usually operated by local TV stations anyway, so that is a voice that already exists in the community. Then that happens in re-transmission consent contracts.

But as the Third Circuit observed, the FCC incorrectly relied on the Internet as a substantial source of local news. As the court said, there is a critical distinction between web sites that are independent sources of local news, and web sites of local newspapers and broadcast stations that merely republish the information already being reported by the newspaper or broadcast station's counterpart. In other words, *washingtonpost.com* is not a different voice from the *Washington Post*. The fact of the matter is, if you look at the numbers, and Commissioner Copps has been very clear about this, the top twenty news web sites are pretty much the ones operated by those five media conglomerates you have been hearing so much about during the past few days. So they are not new voices. And

you certainly cannot expect people to be their own editors. Let us be real. I do not care how advanced the technology gets, people do not want to sit there and compile their own news. They do not want to go to the raw sources and figure out what the real story is. People want journalists to put it together for them, and they do not have time in this information society, as they are increasingly inundated, to do that for themselves. Some people always will want primary sources. And so the Internet is somewhat of a mitigating factor and a blessing as a source of additional information. We want to promote that. But at least for now we cannot forget that newspapers and television are the basic sources for most people.

And the Third Circuit also noted that the FCC got it wrong in treating all media similarly within a given market. It stands to reason that stations with dramatically different levels of listenership do not contribute to diversity similarly. It is nice to have the Third Circuit decision to rely on in thinking about these things. I do not pretend to have all the answers myself, and that is why I think we need more studies about where people get their news and information. As I said when we adopted the rules in 2003, the diversity index really was a good idea in theory. It was well intentioned but ended up being misused. Studies that accept diversity as an appropriate and important goal are good, and they recognize the different contributions of the different media. You could create one that is genuinely and sincerely designed to help the FCC evaluate these critical issues, but we need help in coming up with one that actually works and accurately reflects the marketplace. We need studies about how listeners and viewers use different media—radio and TV—to inform themselves about issues of local concern and public importance, as well as the role of the Internet in that. We need to know more objectively how the web plays a role and whether it is a significant enough role to displace the more traditional media. We need studies to distinguish between media within types. We have got to distinguish between broadcast and cable TV, as well as between local community radio stations with full listenership and a larger station with less listenership—maybe the one that is the outlet of a giant conglomerate that has a huge market share versus the little mom-and-pop. We cannot just equate these. We also need ideas and input on how to improve minority ownership within constitutional limits.

As I said at the outset, we must hear from the public as well. I know that there was a discussion today about whether or not you should weigh the postcards, and whether the FCC should base what we do on how many letters and emails we get. And let me tell

you why in this field, in particular, I think it is important that we listen to the public. It is very simple—it is our statutory obligation. We are guided in this field by a very short piece of statute. We do not have a lot of guidance, like we do in some of the wireline and wireless areas dealing with reciprocal compensation or the unbundling rules for telecommunications; these are areas where the expert agency needs to give its best technical opinion. But in the field of media regulation, it is simply the public interest that guides us. So who is to say that we should not go to the public and ask people what they think is in their own interest? Who are we to say that we know better than the public? What type of arrogance would that be for people in Washington to think that somehow we know better and that we do not have the time or the need to go out and ask them what they think for themselves or that they are not smart enough to know? Particularly considering how much they watch TV and radio. [Laughter] These are experts. There is no better expert witness—there is no better jury—than the American public on what is going on in the media. And when I have gone out and talked to people about it, I have realized that we have some expert witnesses on our hands, and they feel very strongly about it. I have benefited every time I have heard from people about it; be it here, in Dearborn, or anywhere across the country, in any season. I wanted to come here in the winter. I went to Minneapolis the other night. You can question my judgment, if not my commitment.

So we need to go out; we need to have that kind of input. We need to have a kind of depth and breadth of a record that we did not have last time because the court told us that we did not have the basic rationale to support what we were doing. So we had better go back and get it right, and this proceeding, what we spoke about today, will be part of that. We will reconvene with a formal proceeding through an NPRM, but we will also need to engage the public, and so we are going to be running around the country more. We want the new Commission, as it is confirmed, to come out and join us. We need to get this process going.

I do not see the need to wait on the Supreme Court. A lot of people now are waiting to see whether the Supreme Court is going to take up the Third Circuit case. We should be out conducting hearings instead. I am glad I am here now listening to you all and learning about your contributions. We need to find ways to coordinate input from the public and academic studies to come up with the best answers that we can that are intellectually sound, responsive to the public, and within the bounds of our authority.

So just to sum up, I think that diversity is a goal of great importance to the FCC and media ownership. We must strike the right balance and protect the public interest, so we need to find the intersection of what was so fondly referred to in our June 2003 Order as “efficiencies from the combinations that highly affect the public interest.” I know efficiencies help the corporations that want to merge, but that is not our statutory concern unless we can conclude somehow that those efficiencies benefit the public. That is our only obligation under the law. Now you can argue that somehow efficiencies that benefit a corporation may then in turn benefit the public through additional news resources, but to just assume that is to be naïve in the extreme. A publicly held corporation’s responsibility to their shareholders is to maximize profits—and there is nothing wrong with that. But to assume under this kind of a market system that whatever efficiencies will come out of those mergers automatically accrue to the public is just closing your eyes and being blind to the very nature of our economy and all of the structures under which the media operates. So I look forward to input knowledge from the broadcasters, the media companies and their advocates, but I also look forward to hearing from local communities and in particular, academic communities. I was inspired today to hear these discussions, and I think we need to reach out more. It is only with this kind of input that we can really drive intelligent and sensible rules that will promote the goals of diversity of viewpoint, localism and competition through ownership regulation. So thank you very much for having me here today. I appreciate the warm welcome. [Applause]

MOLLY SHAFFER VAN HOUWELING: Mr. Adelstein has graciously agreed to take a few questions, and if he feels like it to answer them. [Laughter] So keep your answers brief so we can maximize the number of people who get a chance. Go ahead.

AUDIENCE MEMBER: Would you give us a sense of the kinds of pressures that you get subjected to on a daily basis. A day in the life of an FCC Commissioner?

JONATHAN ADELSTEIN: Interesting question. I’ve been under these pressures for a while. On the Hill it’s kind of similar.

AUDIENCE MEMBER: I don’t mean guilt . . . [Laughter]

JONATHAN ADELSTEIN: People are constantly saying, “I have got the right answer. I know the whole story. You have got to see it my way.” And then the next media expert comes in and says it is just the opposite. And the pressure is an intellectual one because I just want to know what is right. The wonderful thing about being an FCC Commissioner is that we are independent. I do not have a

boss. I do not answer to the Chairman. He wishes I did. Sometimes we work together very closely, and sometimes we do not. You are your own boss. And so, ultimately, it is your own conscience that is the driver, to a degree it is sensitized. It is a lot of pressure spiritually, morally, and intellectually to try to figure out what the right answer is. There are political pressures as well, but they are easier to resist because they are so varied. I used to be on the Hill, and we would send letters to the FCC because that is where the real policy is. Now that I receive these letters from the Hill, I see that there is usually someone on each side and you can kind of do what you think is right and not necessarily succumb to that, while being responsive to Hill concerns. So, ultimately the pressures are trying to do the right thing in the context of the environment that you are in. It is an environment where there are four other Commissioners, or, in the current situation, three now. We are down to three others, which is good for me as a Democratic minority Commissioner. Just so people understand this, there are three Commissioners from the majority party and two for the minority party, and right now because Chairman Powell has resigned and his successor has not been named, it is two/two. It is really an opportunity for us to work together as we should. Most of what we do is by consensus, and so there is not that much pressure when we all agree. The biggest pressure comes when it is a three/two vote, or a so-called two/two split, and I am the third vote. I am trying to decide. The other sides are both decided, and those are the times when you feel most pressure, because you want to get that one right. If two people have decided, and maybe two others have not, to be the third vote is often a lot of pressure because everybody wants your vote. Of course, the other side does not want you to do it, and so everybody is desperately trying to get your attention and stop you from doing something or get you to do something—to be that crucial third vote. So that kind of weighs on me heavily, and sometimes wakes me up in the middle of the night. But those pressures, I think, are somewhat internal. It is how much you care, and I happen to care a lot. So it is difficult, and the answers are not always clear. That is where it really gets tough, because you will hear an argument, and both sides make a lot of sense. I suppose if you have really good lawyers that come along, and you get two arguments, and both of them just make perfect sense, then you have to figure out from more objective sources what is right and what is wrong. And there are not that many objective sources in my business. We have a few that you can kind of trust do not have another

agenda, but for the most part, everybody has their own agenda. And so you kind of feel lonely in that situation where you are the one who has got to decide what is in the public interest or do what is right for the American people, and you are also constrained by statute. In some cases, you might not be able to do what you think is right because ultimately I have got to do what Congress asks me to do, and even if I do not think it is my best policy judgment, I will always defer to Congress and the law. The advantage is and the pressure is that Congress is often vague when it writes a statute because the difficult issues are so hard to resolve, and they are under much greater political pressures than me in a sense. They end up coming up with fairly broad statutes and then kick it to us to make the tougher final cuts. Applying these statutes can be quite difficult at the FCC, and then the courts often second guess us, particularly the D.C. Circuit. And so we have got to get it right. We want to be upheld.

PANEL MEMBER: I think the average person imagines the FCC the way they imagine the [inaudible] in Russia. They just don't really have a sense of the human [inaudible]?

AUDIENCE MEMBER: You said that there's a need for more studies to understand how the [inaudible]. What's the process that you go through to get those studies. Can the FCC sponsor studies itself? Or do they have to wait for industry? Government industry has really been cracking down, or I should say, not giving money to people who might put out studies that might disagree with the things that they want to believe, so it's been very hard to kind of get those going.

JONATHAN ADELSTEIN: Well, we get studies from all of the above, and we have actually sponsored a few studies ourselves at the beginning of this process. Before I even got on the Commission, Chairman Powell had commissioned a number of studies, spending quite a bit of federal money to do them, and some of them were decent. They helped spur debate in some cases, but there were not enough studies, and they were not deep enough. There was a study about format diversity in radio, for example, that we did, concluding there is plenty of format diversity. And then The Future of Music Coalition managed to scrape together around \$50,000 to do their own study that showed that the way we were defining formats made no sense, and, in fact, completely blew the FCC study out of the water. That is one of the reasons that we did not liberalize the radio rules any more than we did. But what if The Future of Music Coalition could not have come up with those kinds of funds? At least the FCC got the discussion started, so I think the

FCC needs to sponsor more studies. We need to have academics doing more studies, because it is a critical time for us to get that kind of information. We need foundations to consider the extent that they feel it is appropriate to their mission to do what they can to promote these kind of studies. And of course, industry will fund their own studies, which are helpful too. We need to get that perspective. Public interest groups like The Future of Music can do it. It is tough to get people really ginned up to get as much as we need. And ultimately we need to know where people get their news and information from. For example, that question about the role of the Internet deserved a lot of scrutiny. Is it really an independent source? How much of people's time on the Internet getting news and information is from existing sources? I do not think there are any studies that give us the kind of certainty we need to know to what degree we can use the Internet as a source of independent news information, particularly for local news and information.

AUDIENCE MEMBER: My question is what kind of lens or filter have you developed for determining among the information that you yourself as a Commissioner are inundated with about what you should do? How do you tell a genuine grassroots citizen group from an Astroturf group that's funded as a front for a larger telecom corporation or merger media conglomerate or some private interest?

JONATHAN ADELSTEIN: They are pretty easy to tell apart, I think. You can really look at where their funding is coming from. Sometimes they try to obscure it. I just heard today in the social security debate that a group called The Seniors Coalition is arguing *against* allowing imported drugs from overseas. I wonder who paid for that one? I actually happen to know this huge coalition is funded by the pharmaceutical industry. You get to know these things, but you really have to study it pretty closely, and there has been a lot of discussion about how many of the e-mails we get are from a given group. I think there was some discussion about that in your meeting today. In fact, they can be from a lot of different groups. The NRA gave us approximately a half a million postcards against media consolidation, and Moveon.org might have clocked a million, plus we might have received a couple hundred thousand from just individuals who were mad. But you try to tabulate where they come from. I think there were recent tabulations and some of the indecency complaints that we received were very organized, and you can tell that they are all coming from the same, exact source because they all say the same thing, and they have the same

header. But still, 100,000 people complained. You cannot get them to just write on anything either. That is not what you measure it by, but the fact that they care enough to go ahead and do what the organization told them to do is notable. You cannot decide things completely based on that, but we certainly at least look at them. I just got a whole pile, and I was kind of encouraged about it, about the video news releases. Did anybody see the *New York Times* article on Sunday, I think a week ago, about the fact that radio news releases are not being disclosed as such? I am getting thousands and thousands of e-mails at my own personal e-mail account. It is fun to see because I kind of have to agree with these people that this is a problem under our rules. But they are clearly coming from one organization. I can probably guess the name of the organization, but at this point I do not know. I actually replied to one of the people and said, "Hey, who put you up to this?" I do not know if I got a response back because they come in so fast that I would never see the one with the "Re:" in front of it. Maybe I will see it Sunday when I get back to town. But you can kind of tell that way, and you get underneath the surface of it. People feed us good information. Some of the public interest groups will tell us who is really behind things, and people that we trust will help us to break down those that make up these organizations. I have been in Washington long enough to sniff them out.

AUDIENCE MEMBER: Thank you, that makes me happy.

AUDIENCE MEMBER: Thanks again for coming to Ann Arbor. Getting back to the question of studies, I was wondering in a lot of areas—I'm an economics student here as well as a law student. In economics we're always constrained by what government data we can get access to and how much the government provides. In the FCC context, I believe the studies of the FCC Commission, as well as any public interest group or academic studies, have to rely on a privately collected data base, which is mainly on radio and television. You collect mainly from use of advertising. Whereas I'm a little bit skeptical about the usual regulatory [inaudible]. One of the ways in which the industry affects and influences the debate is that they can choose not to collect certain pieces of information and not include them in the database that the FCC itself is trying to use to regulate those very industries. And one of those fields, for instance, is the affiliated network. So, if I want to know, okay, this local station is WPRB in Princeton, New Jersey—where do they get their news, or do they create local news—that field is just blank. So my question is—and I know there's different constraints because corporations don't want to give up information, but what extent

can the FCC affect what kind of information gets collected and could that be part of a licensing context where maybe renewal is closer to a rubber stamp now. Maybe it's a condition of a renewal that they have to provide certain information about their broadcasting in some kind of format so that FCC researchers and others might be able to use it. I'm just wondering what your perspective is on that.

JONATHAN ADELSTEIN: It is a little tricky. Some of the information is proprietary and they have legitimate reasons for not wanting to expose it to the government. Anything that gets disclosed to the FCC has to go out on the public record unless it is part of an enforcement action, which are unique circumstances, and we will provide for some measure of confidentiality. But, ultimately, we would need to make that public if we were going to go forward based on that evidence. So they are sometimes hesitant to do it. Unfortunately, the climate of the FCC in recent years has been against any disclosure. I mean, amazingly enough after the whole implosion of the telecommunications sector and vast fraud for which Bernie Ebbers, for example, was just convicted for up to eighty-five years in jail, we did away with some of our accounting requirements for telecommunications companies. I was thinking, "why would we do this?" But companies spend millions and millions of dollars lobbying us. I am sure they spent infinitely more to lobby us than they do in collecting information that they compile anyway, and this information that we were asking for is what they provide as a matter of course for their own internal accounting and for state regulators. But state regulators in some ways cannot collect what we can, and so they do not get the confidential data, and they relied on the data that we have, then we eliminated some of the requirements over my objections. So you just got to wonder what are we thinking when we do that kind of thing. And in the broadcast media, again, getting some points from their lawyers, claim, "oh, this is so burdensome. We do not want to put our public file up on the Internet." Why not? They put it in all kinds of other things up on the Internet. I am glad they do. All kinds of news and information. It would not take a lot to get that public file up there. But for some reason they are not interested in doing that, I do not know what it is. But trying to get the FCC to do that has been like pulling teeth. We are getting closer now, and I think we are hoping to actually get that rule enacted, but everything goes like that—two years of urging, pleading, and cajoling, and now at least we have something that we can look at on that small issue. We

are trying to get more information to require a more significant licensing and renewal process, and we have had a hard time getting any teeth into that process. That process has largely been turned into a postcard renewal process. There are all kinds of ideas about how you can turn that into something that requires licensees to do more news and local affairs without interfering with constitutional concerns. But just saying that—not that they have to do it, but if they want a streamlined review process they have to provide, say, a certain amount of news and public affairs—and they would have to let us know what that is as part of their renewal process. And if they choose to go through a long drawn out proceeding in front of the full Commission, then they do not have to provide that information. So there are ways of doing it and ways that do not necessarily compel an outcome or impede on constitutional rights, and I think we should do more. I think there should be more accountability, but I am swimming upstream a little in the current environment.

Anything else? Everybody's ready to eat. [Laughter]

TRAVIS SKELTON: Thank you, Commissioner Adelstein. I'm going to be extremely brief. My name's Travis Skelton and I'm the Editor of the *Journal* for, like, another week. So I'm pretty much unaccountable right now. Ryan asked me to come up and tell you briefly about the *Journal*, but I'm not going to do that, because we don't have very much time, and I think this time's better used revisiting a topic that we've talked about already. And that is thank you, Ryan and Liz, for doing such an amazing job putting this together. Now I'm going to hand it over to them. They're going to thank the speakers, and then we're finished for the evening—then it's time to go to the bars.

RYAN CALO: I too am going to be very brief. So basically just thank you everybody for attending this Symposium. This has been something that Liz and I have been thinking about for a year. It's no exaggeration that we began our attempts to get our banquet keynote a year ago. It's just really exceeded my wildest expectations. There were many points throughout this Symposium, but there was one point in the third panel when Commissioner Adelstein asked, "what is it that we can do" and got some real feedback as to what some legitimate ideas are for directly diversifying viewpoint, and it was like this discussion that sort of, like, I was dreaming of. That people that are making decisions talking to academics and practitioners, and the fact that we've generated a real record here and that, I thought, a really candid and polite and wonderful debate in my untrained view. I just want to start off just

this once to thank every single speaker, and we'd like for them to just stand just for one moment if you don't mind. We'd just like to thank all the speakers. [Applause]

Thank you very much. Also we'd like to, of course, thank the moderators who did such a great job.

LIZ WEI: We also have some gifts for the speakers. If you could just wave your hand. Let's start with Commissioner Jonathan Adelstein. We also have Professor Molly Van Houweling, and Alicia Davis Evans, and of course, Professor James Boyd White, who's not here. Then Professor C. Edwin Baker is over there; Dr. Michael Bauman, and Professor Leonard Baynes.

RYAN CALO: Robert Corn-Revere, Professor Douglas, who couldn't be here tonight; Professor Good, Professor Jarvis, Professor Neuman. The thing is the Communications Department has their own graduate event tonight, so unfortunately, they were supposed to be at a table and they couldn't be here. But they were such a great resource to us. Also to Professor Redish and Mr. Schwartzman, Professor Varona and Professor Weinberg. Thank you guys so much. This really could not ever have happened without you and we really appreciate your input.

LIZ WEI: So did all the speakers get a gift yet? We don't want to leave anyone out. Additionally there are several other people we want to thank who were intimately involved in making this work. Everyone's been saying that it's been well organized. Thank you, but we didn't do it alone. We had a lot of help. So if you could just stand up when we say your name so everyone can recognize you. Travis Skelton, who's our Editor in Chief, and Kristen Jacoby, who is our Managing Editor, and Bill Novomisle who is an amazing organizer and person, and he is the man who made the trains run on time actually. He arranged all our transportation.

RYAN CALO: I just want to interject. I cannot stress enough in terms of . . . if you felt that this was well organized, that person right there is one of the main reasons.

LIZ WEI: And then Brian McClatchey helped us organize all the students with the microphones and the timing. Nada Abu-Isa and Mia Solvesson did a lot of the advertising work with us, and emailing the students, and trying to get people to come. Steve Gertz is the person who designed our icons and our graphic. You've seen it around. He just did a fantastic job on it. Then Shawn DeLoach who's actually our AV person . . . there he is. He's doing his job. [Laughter] Thank you so much, Shawn. Finally, Maureen Bishop, who's just been such a resource for us. She's the continuity

every year and she's the one that tells us what to do. And you've all worked with her, and she's helped everybody here tonight. Thank you very much everyone

[Applause].